

Wrongs and their Remedies,

BEING

A TREATISE

ON

THE LAW OF TORTS.

BY

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P R E F A C E.

To those readers who are unacquainted with English law terms it may be desirable to explain, that the word **TORT**, handed down to us from our Norman jurists, is used in our law at the present day to denote a civil wrong, for which compensation in damages is recoverable, in contradistinction to a crime or misdemeanour, which is punished by the criminal law in the interests of society at large, no compensation being awarded for the individual wrong. Every invasion of a legal right, such as a right of property or the right of personal security, constitutes a Tort; and so does every neglect of a legal duty, and every injury to the person, or character, or reputation of another.

The Law of Torts, or civil wrongs, therefore, is a branch of law of general interest and importance, and there are few persons of any property or station in the country to whom a knowledge of it does not become essential at some time or another, either for the purpose of maintaining themselves in their just rights, or for the purpose of ascertaining the nature and extent of their legal duties and responsibilities.

It is not every injury done by one man to another that constitutes a Tort. If, for example, A establishes a school and obtains many scholars, or opens a shop and obtains numerous customers, and B comes and opens a rival school or shop, and draws away A's scholars or customers, an injury has been done to A, but there is no tort or wrong, for one man has as much right by the common law to be a schoolmaster or shopkeeper as another (post, p. 774); but if the scholars or the customers have been drawn away by unlawful means, as by the use of threats, intimidation, or slander, there is then a tort

or wrong, in respect of which compensation in damages may be obtained (post, p. 775). If a fisherman fits out a boat with lines and nets, and goes to fish in the high seas, and another fisherman comes and fishes beside him, and with tempting baits or other contrivances draws away the fish from the lines and nets of the first-comer, with the view of catching them himself, an injury may be done; but there is no tort or wrong, for the one had as much right to fish and use fair and reasonable means to catch fish as the other: but if the rival fisherman lays hold of the nets of the first-comer, or violently disturbs the water and drives away the fish, and prevents the latter by force or violence from exercising his occupation and calling, there is then a wrong done to him, and he is entitled to compensation in damages (post, p. 197).

“To maintain an action for damages,” observes Bayley, J., “the plaintiff must have had a right and the defendant must have done a wrong. A man’s rights are the rights of personal security, personal liberty, and private property. Private property is either property in possession, property in action, or property that an individual has a special right to acquire. A man in trade has a right in his fair chances of profit, and he gives up time and capital to obtain it; so that, wherever a violent or malicious act is done to a man’s occupation, profession, or way of getting a livelihood, there an action for damages is maintainable” (a).

In establishing the existence of a right on the part of a plaintiff important questions constantly arise, involving the title to incorporeal hereditaments (post, pp. 1–73), and to real and personal property (post, pp. 143–156, 194–219), and the use and enjoyment of houses and lands, in subjection to the legal maxim, that every man must so use and enjoy his property as not to make it a nuisance or source of injury and annoyance to others (post, pp. 74–117).

Questions of proprietary right often involve nice distinctions. Thus, as regards the right of a landowner or occupier of lands to birds and animals *feræ naturæ* (post, pp. 195, 196), it has been held, that the owner of a decoy-pond may maintain an action against a person who wilfully discharges guns near the decoy-pond and frightens away the wild fowl (post, p. 75); but that no such action is maintainable for wilfully discharging guns near a rookery and driving

(a) Per Bayley, J., *Hannam v. Mockett*, 2 B. & C. 937; and Holt, C. J., *Keeble v. Hickeringill*, 11 East. 576 n.; post, p. 774.

away the rooks, for no person can claim a right to have rooks resort to his lands, nor can any person become a wrongdoer by preventing their so doing (post, p. 773).

There are many cases in which an act is perfectly lawful in itself, and will continue to be so, until damage has been done to the property or person of another; but from the moment such damage arises the act becomes unlawful, and an action is maintainable for the injury. This is the case where a man sinks mines and makes excavations in his own land, or lights a fire thereon, doing no damage in the first instance to his neighbour, but subsequently causing his neighbour's land to slide down into the artificial hollow (post, pp. 9, 14, 15, 754), or the neighbour's house to be burned by the unexpected spreading of the fire (post, pp. 129-132).

A tort may be dependent upon or independent of contract. If a contract imposes a legal duty upon a party, the neglect of that duty is a tort founded on contract; so that an action *ex contractu* for the breach of contract, or an action *ex delicto* for the breach of duty, may be brought at the option of the plaintiff. When there is a violation of a legal right existing independent of any contract between the parties, such as an invasion of a right of property or of the right of personal security, or an injury to character and reputation, then the tort is not founded on contract, and an action *ex delicto* is alone maintainable.

The same wrongful act may constitute both a civil wrong and a criminal offence, so that the wrongdoer may be punishable by indictment at the suit of the Crown, and be likewise made amenable to an action for damages at the suit of the injured party. Thus, in the case of an assault and battery, there is a violation of the public peace which constitutes a criminal offence, punishable by indictment, as well as a civil wrong in respect of which an action for damages is maintainable. So it is in cases of robbery, where a house has been broken open and money and valuables have been taken away, or a theft has been committed; but whenever the wrongful act amounts to a felony, the remedy for the tort or civil wrong is postponed until the requirements of public justice have been satisfied by the prosecution of the offender (post, pp. 219, 220). The doctrine of the merger of a trespass in a felony only means, that all redress by action for the private injury is suspended until the criminal law has been put in force. It was never intended to take away redress absolutely

after the ends of publick justice were attained, but only to stimulate the party injured to bring the offender to trial for the publick offence, and to prevent any compromise thereof. Where, therefore, a robber had been convicted of felony for breaking into a house and stealing 250*l.*, it was held that an action for the trespass and the taking of the money was maintainable against him after his conviction (*b*).

"All the cases," observes Le Blanc, J., "which show that the action lies after conviction of the defendant for the felony, apply strongly in support of it after an acquittal" (*c*). In the case of misdemeanours, the remedy of the injured party for the civil wrong is not suspended until the offender has been brought to trial for the publick offence.

Torts, it has truly been observed, are infinitely various, and it would be an endless task to enumerate all the wrongs of which the law takes cognizance, and in respect of which redress, in the shape of compensation in damages, is afforded. It is not intended to treat herein of all civil wrongs of every sort and description, but of such wrongs and injuries to property, to the person, and to reputation, as constantly occur in the ordinary intercourse of mankind, and daily occupy the attention of the lawyer: such as wrongful infringements of the rights and privileges incident to the ownership and possession, and use and enjoyment, of landed property; nuisances and injuries arising from the negligent use and management of such property; injuries to lands and tenements from waste, negligence, and fire; injuries from trespasses and unlawful entry on land, in disturbance of the possessory and proprietary rights of occupiers and landlords; wrongful seizure and conversion of chattels; injuries from the negligent use and management of chattels, and the negligent performance of work; injuries from negligence and breach of duty on the part of bailees, common carriers, and common innkeepers; wrongful distress and sale of things distrained; assault and battery, and wrongful imprisonment; malicious arrest, malicious prosecution, and malicious abuse of legal process; trespasses and injuries committed in the execution of void or irregular legal process, or in the execution of warrants and orders of justices; injuries resulting from the exercise, or intended exercise, of statutory powers and authorities;

(*b*) *Dawkes v. Coveleigh*, Styles, 316. *Markham v. Cobb*, W. Jones, 147.

(*c*) *Crosby v. Leng*, 12 East, 414. *Lutterell v. Reynell*, 1 Mod. 283.

injuries from libel and slander; fraudulent misrepresentation and deceit; fraudulent concealment, breach of warranty and false pretences; matrimonial and parental injuries; adultery and seduction. But for a detailed summary of the subjects treated of in the present work, the reader is referred to the annexed table of contents.

At the close of the volume are some chapters on parties to actions ex delicto, on the pleadings, defences, and evidence in such actions, and the damages recoverable therein; and it was intended to have concluded the present work with a chapter upon the remedies afforded for certain civil wrongs, by way of mandamus and injunction; but so many changes are projected and being carried out in this remedial branch of our law that it has been thought advisable to postpone the consideration of it.

It is remarkable that the laws which regulate and control the conduct of mankind in the private relations of life, and define and ascertain their proprietary and personal rights, should form no part of ordinary education or learning; but they have hitherto been so blended with our artificial system of forms of action, and burthened with so many niceties and subtleties peculiar to our ancient technical and refined system of legal procedure and pleading, that the study of them has been rendered tedious and repulsive to all who do not intend to take to the law as a profession. Now, however, that forms of action have been substantially abolished, and the abstrusities of our venerable and refined system of pleading and procedure have given way to a more liberal and enlightened system, the pathway to legal science and to the general attainment of a certain amount of useful legal knowledge has been rendered comparatively easy and inviting.

In the following treatise the Author has endeavoured to present to the reader an accurate view of the present state of the law on the subjects treated of, without burthening his mind with technical legal learning which is now obsolete, or perplexing his judgment with contradictory and conflicting decisions; and it is hoped that the task has been faithfully and carefully accomplished.

*Inner Temple,
June 1860.*

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THE
LAW OF TORTS,
&c.

CHAPTER I.

OF INFRINGEMENTS UPON TERRITORIAL RIGHTS — NATURAL
PRIVILEGES AND SERVITUDES INCIDENT TO THE POSSESSION
OF LAND.

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from adjoining land, and from the subsoil to the surface—Mutual rights and duties of separate owners of the surface and subsoil.

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SECTION I.

OF INFRINGEMENTS UPON TERRITORIAL RIGHTS — NATURAL PRIVILEGES AND
SERVITUDES.

Of territorial rights and privileges naturally incident to the possession of land—Right to the use of running water.—Every landed proprietor has a right to use the water of a natural stream flowing along his land for any reasonable purpose of his own, not inconsistent with a similar right in the proprietors of the land above and below; he cannot seriously diminish the quantity nor deteriorate the quality of the water which would otherwise descend, if by so doing he deprives another riparian proprietor of the beneficial use of the water, unless he has gained a title, by grant or

prescription, so to use the water (a). But an artificial rivulet created by the drainage and pumping of a colliery may be diverted before it flows into the natural stream, and the proprietor on the banks of the natural stream will have no right of action for the diversion of that water (b).

A right to the use and enjoyment of a natural watercourse and water is not affected by reason of the supply of water being uncertain and precarious, and dependent upon the dryness or humidity of the seasons. The intervention of a single dry season or of a series of dry seasons cutting off all the water for a shorter or a longer period, cannot deprive a party of his right to the water when it reappears again in its ancient channel. Where a natural stream meandered down a lane before it entered the plaintiff's land, and the plaintiff varied the ancient channel, by making a straight cut across the road to his own premises, it was held that his right to the water was not affected by the obliteration of the natural channel, and the making of the new watercourse (c).

Diversion of water for purposes of irrigation and drainage.—If a man places a temporary bar or weir across a stream in order to turn it into his own land for purposes of irrigation, and by that means seriously diminishes the current to the prejudice of a riparian proprietor lower down the stream, it is no answer to an action by the latter for damages to set up that the water was only temporarily arrested by the defendant for the purpose of enabling him to irrigate his land (d). The right of the possessor of land through which a natural stream flows to use the water of the stream for irrigation and for manufacturing purposes, depends upon the particular circumstances of each case, upon the volume of the stream, the extent of the loss of water from evaporation or absorption, and the amount of injury inflicted thereby upon other riparian proprietors. "On the one hand, it could not be permitted that the owner of a tract of many thousand acres of porous soil abutting on one part of the stream should irrigate them continually by canals and drains, and so cause a serious diminution of the quantity of water; and, on the other hand, one's common sense would be shocked by supposing that a riparian owner could not dip a watering-pot into the stream in order to water his garden. It is entirely a question of degree, and it is impossible to define precisely the limits which separate the reasonable and permitted use of the stream from its wrongful application" (e).

In the case of surface waters not running in any defined channel, but spreading themselves over the surface of the land, there is nothing to

(a) *Embrey v. Owen*, 6 Exch. 370.
Mason v. Hill, 5 B. & Ad. 13.
Chasemore v. Richards, 5 Jur. N. S. 873;
 H. L. 83 Law, T. R. 358.

(b) *Wood v. Waud*, 3 Exch. 770.

(c) *Hall v. Swift*, 6 Sc. 169. Dig. lib. 8, tit. 3, l. 35.

(d) *Sampson v. Hoddinott*, 1 C. B. N. S. 612.

(e) *Embrey v. Owen*, 6 Exch. 372.

prevent the landowner from dealing with them as he pleases (*f*), provided he does not divert the water from a spring-head, or prevent it from flowing by a regular natural channel to the lands below (*g*). He has no right by any system of artificial drainage to cut off the natural visible supply of surface-water from ancient watercourses and rivulets; and he ought so to arrange his drains as to restore the water at the boundary of his estate to its ancient channels, that the lands situate on a lower level may not be deprived of their natural supply of the precious element, for a man has no right to make improvements on his land, which produce injury to his neighbour.

By the French law, the proprietor of a field in which a spring rises or through which it flows, is not entitled to take and appropriate to his own use the whole of the water, or divert it from other proprietors of lower fields through which the water flows. He cannot change the course of the stream, or materially diminish the ancient supply of water; but every proprietor of land bordering on a running stream may use it for the purpose of irrigating his land, and when his estate is intersected by such water, he may divert it for purposes of irrigation on condition that he restores it at the boundary of his property to its ordinary channel; and in all disputes respecting the right to take water from running streams, the courts are enjoined to reconcile as much as possible the interests of agriculture with the respect due to property and the rights of individuals (*h*).

Effect of acquiescence in the unlawful diversion of water from a running stream.—If a portion of a natural stream has been unlawfully diverted for the supply of a mill, causing an injurious diminution in the flow of water to the proprietors lower down the stream, these last must interrupt the unlawful enjoyment of the diverted water by taking legal proceedings against the wrong-doer, in order to prevent the injurious act from being eventually converted into a right (post, ch. 2). If the wrong-doer is convicted and fined, or a verdict is obtained against him in an action, the conviction and record of the proceedings show conclusively that the enjoyment was interrupted, and that there was no acquiescence in the unlawful use of the water (*i*).

Of the right to pen back water.—A landowner may put a penstock on his own grounds, and pen the water there as he will, until he has done damage to his neighbour. "Until you prejudice your neighbour by penning back the water, you do that which you have a right to do: but where you begin to injure your neighbour, there your right to pen back

(*f*) *Broadbent v. Ramsbotham*, 11 Exch. 617. 25 Law J., Exch. 115.

(*g*) *Brown v. Best*, 1 Wils. 174. *Dud-den v. Guardians of Clutton Union*, 1 H. &

N. 627. 26 Law, J., Exch. 146.

(*h*) Cod. Nap. liv. 2, No. 040-045.

(*i*) *Eaton v. Swansea Water Co.*, 17 Q. B., 267.

terminates" (*k*), unless you have penned back under a title by grant or prescription (post, ch. 2). No action will lie for diverting or throwing back the water, except by a person who sustains actual injury therefrom (*l*). But the party by or over whose land the stream passes, must not shut the gates of his dams and detain the water unreasonably, or let it off in unusual quantities to the prejudice of his neighbour. The just and equitable principle is given in the Roman law: "sic enim debere quem meliorem agrum suum facere, ne vicini deteriore faciat" (*m*). If the user by the defendant has been beyond his natural right, and is injurious to the natural rights of the plaintiff, an action is maintainable, unless the user is sanctioned by grant or prescription (*n*).

Injuries from the defilement of streams.—Every riparian proprietor has a right to the flow of the stream through his land in its natural purity; and if a riparian proprietor higher up the stream throws dirt and ashes, or gas refuse into it, so as to defile the water and render it unfit for use, to the damage of another riparian proprietor who has been in the habit of using the water, an action is maintainable for the injury (*o*), unless an adverse right has become vested in another by grant or prescription. A right to foul a stream with all sorts of refuse may, as we shall presently see, be established by proof of the continued and uninterrupted use of the stream as a drain and sewer for twenty years (*p*).

Disturbance of the permissive use and enjoyment of water.—A landowner or occupier of a house who receives permission from an adjoining landowner to draw water from the premises of the latter through a pipe or watercourse, is entitled to an action for damages if the water is fouled by a wrong-doer, and damage is sustained by him from the fouling of the water. Though there may be no right on the part of a plaintiff to have water flow to his premises, yet if the water does come, and the defendant fouls it without having any right so to do, and so causes foul water to flow into the plaintiff's premises, and the plaintiff sustains damage therefrom, and the defendant cannot justify, the plaintiff will be entitled to recover all the damage he has sustained from the wrongful act. The plaintiff in such a case relies upon no title to the water as riparian proprietor, but merely alleges that he was lawfully in the enjoyment and use of water flowing through his premises in a pure and unpolluted state, and that the defendant wrongfully fouled it (*q*).

(*k*) Lawrence, J., *Cooper v. Barber*, 3 Taunt. 108.

(*l*) *Wright v. Howard*, 1 Sim. & Stu. 203. *Williams v. Morland*, 2 B. & C. 910.

(*m*) Parke, B., *Embrey v. Owen*, 6 Exch. 371.

(*n*) *Sampson v. Hoddinott*, 1 C. B. N. S. 612, post, ch. 2.

(*o*) *Murgatroyd v. Robinson*, 7 Ell. & Bl. 301; 26 Law, J., Q. B. 233. Post, ch. 3, s. 1. NUISANCES.

(*p*) Post ch. 2, 3.

(*q*) *Laing v. Whaley*, 3 H. & N. 685, affirming the judgment of the Court of Exchequer in *Whaley v. Laing*, 2 H. & N. 476.

Of the right of landowners to well-water.—The right to the enjoyment of the water of a stream flowing in its natural course over the surface of land, and the right to underground water and springs beneath the surface, are not governed by the same rules of law. It has been held that a landowner has a right to sink a well in his own land, and get as much water as he pleases, although he thereby seriously diminishes the supply of water to the springs and wells in his vicinity, or even drains them dry. The only remedy for the adjoining landowner consists in sinking deeper wells, and using pumps and mechanical appliances on his own land, to enable him to get back the water (*r*). A landowner who has sunk a well in his own land, and thereby enjoyed the benefit of underground water, has no right of action against a neighbouring proprietor who, in sinking for and getting coals from his soil in the usual and proper manner, causes the well to become dry (*s*).

The use and consumption of the water from wells is not confined to the reasonable wants of the occupiers of the land in which the well is sunk, nor restrained by any consideration for the wants and necessities of others. Where the defendant sunk a well seventy-four feet in depth in his own land, adjoining the source of an important river, which supplied water to various mills and manufactories, and pumped water from this well for the supply of a neighbouring town, at the rate of half-a-million of gallons a day and upwards, and by this means obviously interrupted a great deal of water which would have otherwise found its way into the river, and so diminished the volume of water in the river, and prevented the millowners from working their mills full time, it was held that the landowner had not exceeded his natural rights, and that the millowners had no remedy for the injury they had sustained (*t*)! A distinction, however, ought in reason and justice to be made between the diversion of water from the ancient sources of springs, and natural watercourses, and running streams, and the diversion of water from an artificial well. If one man sinks a well in his land to get water, another landowner has an equal natural right to do the same; and if one well is drained dry by the digging of another, the mischief may be remedied by deepening the dry well; but the riparian proprietors of a natural stream which has been drained dry by the sinking of wells and shafts, and the pumping away of all the water from the subterranean sources of supply, have no means whatever of counteracting the mischief, and getting back any portion of the diverted water. Here the

(*r*) *Chasemore v. Richards*, 26 Law, J., Exch. 401; 33 Law, T. R. 350; H. L. 5 Jur. H. L. N. S. 878.

(*s*) *Acton v. Blundell*, 12 M. & W. 324. So by the Pandects, "Cum eo qui in suo fodiens, vicini fontem avertit, nihil posse

agi; nec de dolo actionem et sane non debet habere; si non animo vicini nocendi, sed suum agrum meliorem faciendi id fecit."—Lib. 39, tit. 3, l. 12. Domat. Liv. 2, tit. 8, s. 1.

(*t*) *Chasemore v. Richards*, ante, p. 5.

maxim, "Sic utere tuo ut alienum non lædas," appears to be rejected by our law.

Of the flooding of lands from artificial collections of underground water.—Where the owner of a coal-field excavated his coal, and in so doing left large hollows, which filled with water, and then, when the adjoining land-owner proceeded to work his coal, the subterranean water from the hollows flowed into his workings and flooded them, it was held that he had no right of action for the damage (u).

Natural and necessary servitudes.—It is essential to the full and free enjoyment of the proprietary rights of the possessors of the soil, and to the beneficial occupation and enjoyment of landed property, that the estates of adjoining and neighbouring landowners should be burthened with certain mutual services, which may be denominated natural or necessary servitudes. Land, for example, cannot be cultivated or enjoyed unless the springs which rise on the surface and the rains that fall thereon be allowed to make their escape through the adjoining and neighbouring land. All lands, therefore, are of necessity burthened with the servitude of receiving and discharging all waters which naturally flow down to them from lands on a higher level; and if the owner or occupier of the lower lands interposes artificial impediments in the way of the natural flow of the water through or across his lands, and by so doing causes the higher lands to be flooded, he is responsible in damages for infringing the natural right of the possessor of such higher lands to the natural outfall and drainage of the soil (x). So if the proprietor of the higher lands alters the natural condition of his property, and collects the surface and rain-water together at the boundary of his estate, and pours it in a concentrated form, and in unnatural quantities, upon the land below, he will be responsible for all damage thereby caused to the possessor of the lower lands (y).

We have seen, that every landed proprietor has, *ex jure naturæ*, a right to the continued flow of natural streams and rivulets, running through his land, and a right to the reasonable use of the water of such streams (ante, p. 1, 2). Lands, therefore, through which a natural stream flows, are burthened with the servitude of receiving and transmitting the waters of the stream to the lower land; and the possessor of the land, through which the stream runs, is clothed with the duty of keeping the channel and bed thereof free from artificial and unnatural obstructions.

The right to these rural and predial services, and the duty of rendering them, necessarily contract the exercise of dominion on the part of

(u) *Smith v. Kenrick*, 7 C. B. 505.

(x) *Shury v. Piggot*, 3 Bulstr. 340.

Chasemore v. Richards, H. L. 5 Jur. N. S.

877; Dig. Lib. 39, tit. 8.

(y) *Sharpe v. Hancock*, 8 Sc. N. R. 40.

the owners of adjoining and neighbouring estates over their lands: but the restraint is mutually beneficial to all proprietors; it is essential to the due cultivation and enjoyment of the soil, and is based upon the venerable maxim, "*Sic utere tuo ut alienum non lædas.*"

In the Code Napoléon, under the head of "*Servitudes derived from the Situation of Places,*" we read, that "All lower lands are subjected, as regards those which are higher, to receive the waters which flow naturally therefrom, to which the hand of man has not contributed. The proprietor of the lower ground cannot raise a bank which shall prevent such flowing, nor can the superior proprietor of the higher lands do anything to increase the servitude of the lower lands" (z).

Of the natural servitude of support from adjoining lands.—Every proprietor of land is entitled of common right to such an amount of lateral support from the adjoining land of his neighbour as is necessary to sustain his own land in its natural state not weighted by walls or buildings (a). If the land has been weighted by superstructures, the landowner who has thus weighted his land is not entitled, *ex jure naturæ*, to the additional support from his neighbour's soil, necessary for the maintenance of the buildings, for one landowner cannot, by altering the natural condition of his land by erecting buildings thereon, deprive his neighbour of the privilege of using his land, as he might have done before (b).

In an old case in Roll's "Abridgement," it is said, that "if A be seised in fee of copyhold land closely adjoining the land of B, and A erect a new house upon his copyhold land, and any part of his house is erected on the confines of his land adjoining the land of B, if B afterwards dig his land so near to the foundation of the house of A, but not in the land of A, that by it the foundation of the messuage, and the messuage itself, fall into the pit, still no action lies by A against B, inasmuch as it was the fault of A himself that he built his house so near the land of B, for he cannot by his own act prevent B from making the best use of his land that he can; but it seems, that a man who has land closely adjoining my land cannot dig his land so near mine that mine would fall into his pit; and an action brought for such an act would lie" (c).

If a man digs a well on his own land so close to the soil of his neighbour as to require the support of a rib of clay or stone in his neighbour's land to retain the water in the well, no action will lie against the owner of the adjacent land for digging away such clay or stone which is his own property, and thereby letting out the water, unless a prescriptive

(z) Cod. Nap. No. 640-642.

(a) *Humphries v. Brogden*, 12 Q. B. 744. *Solomon v. Vintners' Company*, 7 Week Rep. 613; 38 Law, T. R. Exch. 224; 4 Exch. 585.

(b) *Wyatt v. Harrison*, 3 B & Ad. 375. *Partridge v. Scott*, 3 M. & W. 220, post.

(c) *Wilde v. Minsterley*, 2 Roll. Abr. 565.

right to the use of the water has been gained by twenty years' uninterrupted enjoyment (*d*).

Of the natural servitude of support from the subsoil to the surface of land when the surface and subsoil constitute separate freeholds vested in different proprietors.—Mutual rights and duties of separate owners of the surface and subsoil.—The possession of the surface of land may be in one man and the subsoil in another, by separate grants from the owner of the inheritance; or the owner may grant the surface to another to be cultivated and enjoyed, reserving to himself a right to the subsoil, and to all stones and minerals beneath the surface. When land is so held each proprietor is possessed of a "close," and has a separate and distinct freehold. If the owner of land grants the subsoil, reserving the surface to himself, he impliedly grants reasonable means of access to the subsoil, and the grantee would have a right to go upon and dig through the surface, to enable him to reach the subsoil, if he had no other means of access thereto. But the owner of the subsoil may maintain an action against the owner of the surface if he digs holes in the subsoil to a greater extent than is reasonably necessary for the proper and fair use, cultivation, and enjoyment of the surface (*e*); and the owner of the surface may, on the other hand, maintain an action against the owner of the subsoil if the latter carries on his mining and subterranean operations so as to interfere with the fair use and enjoyment of the surface in accordance with the ancient maxims, "*prohibetur ne quis faciat in suo quod nocere possit alieno*," and, "*sic utere tuo ut alienum non lædas*" (*f*).

The owner of the surface, therefore, is entitled of common right to the support of the subjacent strata, so that the owner of the subsoil and minerals cannot lawfully remove them without leaving support sufficient to maintain the surface in its natural state (*g*). This is a rule of law founded on natural justice, and is a restraint on the exercise of dominion over property essential to the beneficial occupation and enjoyment of the soil. If land not granted expressly for building purposes is weighted with buildings, the owner of the surface has no right to the additional support necessary for the maintenance of the buildings until he has acquired the right by grant or prescription (post, ch. 2); so that if the owner of the subsoil in working mines leaves sufficient support for the surface, but the land sinks in consequence of the weight of the buildings that have been placed upon it, the owner of the subsoil is not responsible for the damage

(*d*) *Tindal, C. J. Acton v. Blundell*, 12 M. & W. 353, post, ch. 2.

(*e*) *Cox v. Glue*, 12 Jur. 185; 5 C. B. 551.

(*f*) *Wilkinson v. Proud*, 11 M. & W. 39. *Rowbotham v. Wilson*, 8 Ell. & Bl. 142.

(*g*) *Humphries v. Brogden*, 12 Q. B. 739; 28 Law, J., Q. B. 10. *Smart v. Morton*, 5 Ell. & Bl. 47; 24 Law, J., Q. B. 260. *Roberts v. Haines*, 27 ib. Exch. 49.

done (h). But if the weight of the buildings has in no way caused the sinking of the land, and the land would have fallen in whether buildings had been erected on it or not, the building on the land becomes quite immaterial, and the defendant is responsible in damages to the extent of the injury done to both houses and land (i).

Upon every demise of mineral or other subjacent strata the lessor impliedly retains his right of support from the subsoil to the surface, in the absence of express words showing distinctly that he has waived or qualified his right (k).

If the owner of the subsoil excavates it without leaving proper support for the owner of the surface, the latter has no right of action until some actual damage has been sustained by him. "If that were not so, the owner of the subjacent land could not abstract the minerals, nor avail himself of the full benefit of his property, without being liable to an action; though before any damage had actually occurred he had, by substituting other means of support, removed all danger of injury to the plaintiff's property. This would be wholly inconsistent with the right of the proprietor to use his property as he pleases, provided he does not injure that of his neighbour" (l).

SECTION II.

OF ACTIONS FOR INFRINGEMENTS OF TERRITORIAL RIGHTS.

Direct and consequential injuries.—If the injury of which the plaintiff complains has been committed by the defendant upon land in the actual possession and occupation of the plaintiff, and is consequently the result of a direct act of trespass, the plaintiff should bring his action and frame his proceedings for a trespass upon his land (post, ch. 4). If the injury results from something done by the defendant on his own land, which is unlawful only in respect of the consequential injury thereby occasioned to the plaintiff, the action must be brought for the consequential injury, and not for a trespass, and proof of actual substantial damage is essential to the cause of action.

(h) *Bonomi v. Backhouse*, 33 Law, T. R. 333.

(i) *Brown v. Robins*, 4 H. & N. 191; 28 Law, J., Exch. 250. *Rogers v. Taylor*, 27 Law, J., Exch. 175.

(k) *Dugdale v. Robertson*, 5 Kay & J. 700.

(l) Per Wightman, J. *Bonomi v. Backhouse* (27 Law, J., Q. B. 387), who differed from the majority of the Court, but was supported by the Court of Exchequer Chamber, 33 Law, T. R. 333, 7 Week Rep.

Parties to be made plaintiffs—Tenant and reversioner.—The actual occupier of the land is in general the proper party to maintain an action for wrongful acts of a temporary character interfering with the beneficial use and enjoyment of the property, and diminishing the value of his possessory interest. If the injury is of a permanent nature, causing damage to the inheritance, then the reversioner is also entitled to maintain an action in respect thereof. Thus, if A is seised in fee of the reversion of a close, expectant upon a term for years, and B is possessed of another close adjoining thereto, through which close there runs a rivulet, and B stops it, *per quod* the close of A is surrounded, so that the timber-trees, &c. become rotten, A, in respect of the prejudice to the reversion, and the termor, in respect of the injury to the possession, and the loss of the shade, shelter, &c. of the trees, may each have an action, and satisfaction given to one is no bar to the other (*m*). The action for injuries to reversionary estates is of comparatively modern introduction, and appears to have been substituted for the action of waste. The principle on which the action is held to be maintainable is, that although the evil might be remedied before the end of the term, yet in the meantime, if the reversioner wished to sell his interest, it would be less valuable (*n*). It is necessary, therefore, in an action by a reversioner to show a permanent injury to the property, lessening its value in the market (*o*), or an infringement upon the plaintiff's rights as landlord (post, ch. 2, s. 2, and ch. 4).

The party who sues in respect of an injury to the reversion, must be the party in whom the legal estate is vested, and not a person having a mere equitable interest as *cestui que* trust (*p*). If several parties are entitled to the reversion as joint tenants, or tenants in common, they should all be joined as plaintiffs in an action for an injury to the reversion (*q*).

Of the parties to be made defendants.—Every person who orders or authorizes an obstruction to the enjoyment of the natural rights incident to the ownership of real property, is responsible for the injury, and for all consequential damages, and so are his servants and agents, who carry into effect the orders he has given (*r*). When several persons have been jointly concerned in the commission of the wrongful act, they may all be made defendants and charged as principals, or the plaintiff may sue one or more of them at his election (*s*).

Of the plaintiff's declaration of his cause of action — Venue.—The venue or

(*m*) *Bedingfield v. Onslow*, 3 Lev. 209.
And see post, ch. 2, s. 2, ch.

(*n*) *Jesser v. Gifford*, 4 Burr, 2141.

(*o*) *Jackson v. Peaked*, 1 M. & S. 234.

(*p*) *Vallance v. Savage*, 7 Bing. 599.

(*q*) Bac. Abr. JOINT TENANTS, K. And see further, post, ch. 19, as to the joinder of parties to actions *ex delicto*.

(*r*) Post, ch. 19.

(*s*) Post, ch. 19.

statement in the margin of the declaration of the name of the county from whence the jury are to be summoned, and where the cause of action is to be tried, is local in all actions for infringements of territorial rights annexed to lands or tenements, so that the cause of action must be laid and tried in the county in which it arose, unless a judge's order is obtained for changing the venue and place of trial. The nature of the territorial right must be set forth on the face of the declaration, and the plaintiff must claim it by reason of his possession of a messuage, tenement, or land. If the plaintiff complains of the diversion or fouling of water from a natural watercourse, he must declare upon his own possession of the place through which the water used to run, and set out the course thereof, and show the mode in which the water has been diverted, or fouled (*t*). The usual course is to set forth the plaintiff's possession of a messuage, tenement, or land, and aver that by reason of such possession, he had a right to the enjoyment of an uninterrupted flow of the water of a natural stream running in its natural bed, or flowing in its natural purity unto the messuage, tenement, or the land of the plaintiff, and that the defendant wrongfully diverted large quantities of the water of the stream, or wrongfully polluted and defiled the water thereof, showing the nature of the diversion or pollution, and alleging that the defendant thereby prevented the plaintiff from having his accustomed and proper supply of water, or deprived him of the beneficial use and enjoyment of the water, as the case may be, claiming damages.

If the plaintiff complains of an obstruction to the natural flow of the water, he should show the nature of the obstruction and the consequential damage in the flooding of the plaintiff's land, the destruction of the grass and produce of the soil, and the deposit of stone, sand, and rubbish upon the land, as the case may be, claiming damages (*u*), or, if need be, a writ of injunction against the repetition or continuance of the injury.

A declaration which alleges that the plaintiff was lawfully in the enjoyment and use of water flowing through his house and premises in a pure and unpolluted state, and that the defendant wrongfully fouled and defiled the water ● pouring into it the refuse of certain chemical works, whereby the plaintiff was deprived of the use of the water, and his property was deteriorated in value, seems to disclose a good cause of action (*x*).

Declarations for infringements of the natural right to support from adjoining land.—If injury has been done to the foundations and walls of a dwelling-house, or of buildings occupied by the plaintiff, by excavations in the soil amounting to direct acts of trespass upon the land in the plaintiff's

(*t*) *Brown v. Best*, 1 Wils. 174. Parke, B., *Chasemore v. Richards*, 7 H. L. C.
(*u*) *Carlyon v. Lovering*, 1 H. & N. 784;
26 Law, J., Exch. 251.

(*x*) *Laing v. Whaley*, 3 H. & N. 685,
affirming *Whaley v. Laing*, 2 H. & N. 476.
And see post, ch. 3, NUISANCES.

occupation, the ordinary declaration for a trespass upon the realty (post, ch. 5, s. 2), properly describes the true cause of action. If the injury has been done by a tenant in the possession and occupation of the buildings and land under a demise from the plaintiff, the proper form of declaration is a declaration for waste (post, ch. 4, s. 2). If the surface and subsoil are held by different persons, and constitute separate freeholds, and the declaration is founded on an injury to the owner of the surface by excavations made by the owners of the subsoil, depriving the surface of its natural support (ante, p. 8), it is sufficient to allege that the plaintiff was possessed of the surface of certain land, and the defendant was possessed of the subsoil, mines, and mineral—or of certain beds and strata of stone beneath such surface, and that the defendant excavated the subsoil, or dug out the minerals or stone, without leaving sufficient support for the surface, and by reason thereof the surface of the land gave way and sunk into deep holes and hollows, and became useless to the plaintiff, and certain crops of wheat and beans, &c. growing upon the land, were utterly destroyed (y).

A good cause of action is disclosed on the face of a declaration, which alleges, that at the time of the committing of the grievance of which the plaintiff complains, the plaintiff was possessed of certain messuages, belonging to and supporting which messuages, were certain foundations which the plaintiff, by reason of his possession of his messuages, ought of right to have enjoyed for the support of such messuages, and that the defendant wrongfully dug out and destroyed the foundations of the messuages, and by reason thereof they gave way and fell to the ground, and the plaintiff was deprived of the use of them (z). A declaration, also, by a reversioner, setting forth, that a messuage and land with the appurtenances were in the respective occupations of certain persons as tenants thereof to the plaintiffs, the reversion of the said messuage, land, &c., then and still belonging to the plaintiff, and that the defendant wrongfully made divers excavations in the said land, under or near to the said messuage, without sufficiently shoring and propping up the said messuage from the effects thereof, whereby the land sank, and the foundations of the messuage, &c., gave way, and the plaintiff was injured in his reversionary estate, discloses a good cause of action (a).

Plea by the defendant.—The plea of not guilty operates as a denial only of the wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement. If, therefore, the plaintiff's possession of the property alleged to have been injured by the wrongful

(y) *Bibby v. Carter*, 4 H. & N. 153.
Jeffries v. Williams, 5 Exch. 792.

27 Law, J., Exch. 173.

(z) *Rogers v. Taylor*, 2 H. & N. 829;

(a) *Bibby v. Carter*, 28 Law, J., Exch. 182; 4 H. & N. 155, post, ch. 2, s. 2.

act of the defendant, or his title thereto, or his estate or interest therein, is intended to be denied, it must be specially traversed. All other pleas in denial must take issue on some particular matter of fact alleged in the declaration, and all matters in justification, and in confession and avoidance of the cause of action, must be specially pleaded (b).

Not guilty by statute.—In every case in which a defendant pleads the general issue, intending to give the special matter in evidence, by virtue of an act of parliament, he must insert in the margin of the plea the words "by statute," together with the year or years of the reign in which the act or acts of parliament, upon which he relies for that purpose, were passed; and also the chapter and section of each of the acts, and specify, whether they are public or otherwise, or the plea will be taken not to have been pleaded by virtue of any act of parliament, and such memorandum must be inserted in the margin of the issue, and of the nisi prius record (c).

Traverse of the right claimed by the plaintiff.—If the defendant, therefore, intends to dispute the existence of the right asserted in the declaration, he must expressly deny the right by a plea traversing the allegation or assertion of it, in the very words in which it is put forward. Thus, where the declaration states, that the plaintiff was possessed of a close, and by reason thereof, was entitled to have the use and benefit of a certain stream of water, &c., and the defendant intends to dispute the right, he must by his plea assert that the plaintiff was not, by reason of the possession of the said close, entitled to have the use and benefit of the said water, &c.

Of the plea of leave and license.—If the obstruction to the enjoyment of the right has been authorized by the plaintiff, or if the act complained of has been done by his permission, the defendant must plead, that he did what is complained of by the plaintiff's leave (d). This plea will be supported by proof, that the plaintiff gave the defendant permission to alter the condition of his property in such a way as to interfere with the enjoyment of the right.

Under this plea it may be shown, that the plaintiff having a right to the use of a stream of water, which flowed through the land of the defendant, gave the defendant permission to lower the banks of the stream, and erect a weir, and divert a portion of the water which had previously flowed to the plaintiff's mill, and that the banks were cut down, and the weir erected, pursuant to the permission so given (e). Having consented to the act, the plaintiff, and those claiming title through him, are precluded from treating the act as a wrong or injury.

(b) Reg. Gen. Hil. Term, 10, Vict. post, ch. 20.

(c) Reg. Gen. Hil. Term, 1853. 1 Ell. & Bl. App.

(d) 15 & 16 Vict. c. 76, Sched. B., No. 44.

(e) *Liggins v. Inge*, 5 M. & P. 712; 7 Bing. 682.

Evidence at the trial—Proof on the part of the plaintiff.—If the defendant pleads that he is not guilty of the act of which the plaintiff complains, it must, of course, be proved either that it was done by his own hand, or by his orders or authority, or by his servants or agents in the course of their employment, or in following out his orders and directions (f). If the plaintiff's possession and incidental rights are traversed, the plaintiff must prove the fact of his possession of the lands or tenements to which the right claimed was incident, at the time of the commission by the defendant of the grievance of which the plaintiff complains. This may be established by the plaintiff's own testimony upon the point, or by proof of the exercise of acts of dominion, or by general user and enjoyment, or actual occupation (g).

Proof of seizin of lands and tenements.—An allegation in pleading that a party is seized of a messuage or land, does not necessarily import that such land is in his own occupation. If, therefore, a landlord pleads seizin in fee, and the seizin is traversed, the traverse is not supported by proof that the land is in the occupation of a tenant to whom the landlord has demised it (h).

Damages recoverable.—Wherever the exercise and enjoyment of a right naturally incident to the possession of land has been obstructed, substantial damages are recoverable, though no actual perceptible damage has been sustained or proved, whenever the repetition of the wrongful act, if uninterrupted and undisturbed, would lay the foundation of a legal right. A wrongful defilement of a stream is an injury to a right, in respect of which damages are recoverable, although no actual specific damage can be proved. Thus, where certain manufacturers erected works on the bank of a stream, and fouled the water with soap-suds, but no actual damage was proved to have been sustained by the plaintiff, it was held that he was nevertheless entitled to recover damages, as a continuance of the practice without interruption would eventually establish a right on the part of the defendants to the easement of discharging their foul water into the stream (i).

But when the act of which the plaintiff complains has been done by the defendant on his own land, and the constant repetition of it, however long continued, would establish no prescriptive right against the plaintiff, there is no cause of action until some substantial, perceptible damage has been sustained by the plaintiff. Proof of such damage in such a case is essential to the establishment of a cause of action. Thus, where a landowner digs in his own land, or the owner of the subsoil and mine-

(f) Post, ch. 20.

(g) *Page v. Hatched*, 8 Q. B. 593.

(h) *Stott v. Stott*, 16 East, 350.

(i) *Wood v. Waud*, 3 Exch. 772. *Rochdale Canal Co. v. King*, 14 Q. B. 185, 188, post, ch. 2, s. 1.

ral excavates his own freehold, there is no wrongful act, and no cause of action until it is proved that the surface of the adjoining land has sunk down, or that the walls of a neighbouring house have cracked, or the foundations thereof have been displaced, or have given way, or that some actual perceptible damage has been done to the adjoining land or tenement (*k*).

Apportionment of damages as between tenant and reversioner.—Whenever the enjoyment of a privilege or right annexed to the ownership or occupation of land has been obstructed by the wrongful act of the defendant, and the land to which the right or privilege is annexed is in the occupation of a lessee, damages are recoverable in respect of the injury to the residential or possessory interest of the latter, and by the landlord or reversioner in respect of the permanent injury to the inheritance (*l*). Thus, where freehold premises are let on lease, and the owners and reversioners stand in the relative positions of tenant for life, remainder in tail, and the reversion in fee, and a permanent injury has been done to the beneficial occupation and enjoyment of the property, the damages recoverable by the immediate reversioner, the tenant for life, are confined to the injury done to his life-interest (*m*). But a mere temporary impediment to a drain which is remediable, and does not cause any permanent injury to the property, does not give the reversioner any right of action for damages.

If the constant repetition of the unlawful act would form the foundation for the establishment of a prescriptive right which, when once established, would operate to the lasting injury of the inheritance, and permanently diminish the value of the property, the reversioner is, as we have seen, entitled to an action for the recovery of damages.

(*k*) *Bonomi v. Backhouse*, 33 Law, T. R. 333, overruling *Nicklin v. Williams*, 10 Exch. 259.

(*l*) As to the apportionment of da-

mages between tenants and reversioners, see post, ch. 13, s. 1.

(*m*) *Evelyn v. Raddish*, Holt, N. P. C. 543.

CHAPTER II.

OF OBSTRUCTIONS TO THE ENJOYMENT OF EASEMENTS AND PROFITS À PRENDRE—CONVENTIONAL AND PRESCRIPTIVE PRIVILEGES AND SERVITUDES.

SECTION I.—*Of easements, profits à prendre, and conventional and prescriptive privileges and servitudes*—Dominant and servient tenements—Customary rights and rights of common—Creation and transfer of incorporeal rights and privileges—Grants and licenses—Of prescriptive rights of way, rights of common, rights to water and watercourse, over or across a neighbour's land—Rights of support from a neighbour's land and buildings—Rights to the maintenance of fences—Rights to

light and air—Waiver, merger, and extinguishment, and revival and recreation of easements, privileges, and servitudes—Of the maintenance and repair of ways and watercourses.

SECTION II.—*Remedies for the infringement of incorporeal rights*.—Abatement of obstructions to the enjoyment of easements, privileges, and profits—Actions for damages—Parties, pleadings, defences, and evidence—Damages recoverable.

SECTION I.

EASEMENTS AND PROFITS À PRENDRE—CONVENTIONAL AND PRESCRIPTIVE PRIVILEGES AND SERVITUDES.

An easement is a liberty or privilege which one proprietor has acquired by custom, grant, or prescription, over the land of another proprietor, unaccompanied by any profit or interest in the soil itself, such as a right to take water from a neighbour's well, or to wash and water cattle at a neighbour's pond (*n*); a right to hang and dry clothes on lines on a neighbour's land (*o*), or to hang and dry nets thereon (*p*), or to turn the plough thereon in ploughing (*q*), or to discharge water thereon from the roofs and eaves of houses (*r*), or to have the benefit of a neighbour's fence or hedge maintained and repaired at the expense of such neighbour (*s*). An easement

(*n*) *Race v. Ward*, 4 Ell. & Bl. 702; 24 Law, J., Q. B. 153. *Manning v. Waddale*, 5 Ad. & E. 758.

(*o*) *Drewell v. Towler*, 3 B. & Ad. 735.

(*p*) 7 Vin. Abr. p. 183. Custom F. pl. 2.

(*q*) *Ib.* p. 174. Custom P. pl. 4; F. pl. 1.

(*r*) *Thomas v. Thomas*, 2 C. M. & R. 34.

(*s*) *Boyle v. Tamlin*, 6 B. & C. 338; 9 D. & R. 437.

or privilege of this description is claimable by custom (t), grant, or prescription, but not, as we shall presently see, by parol license without deed (u).

A *profit à prendre* is a right vested in one man of entering upon the land of another, and taking therefrom a profit of the soil. It is an incorporeal right, clothing the possessor of it with an interest in land, and is claimable only by grant or by prescription (post, p. 39). Such is the right of depasturing cattle over another's land; the right to cut therefrom and carry away turf or wood for burning within the dwelling-house; the right to dig for and carry away stone, slate, coal, and minerals; the right to shoot and sport over land, and carry away and consume the game killed; the right to fish in the waters of an estate or of a manor, and carry away and consume the fish taken. Rights of this description are not claimable by custom, however ancient. Therefore a custom to take drift-sand from a close contiguous to the sea-shore is bad, and will not justify or excuse an entry on land for such a purpose (x).

Conventional servitudes.—Dominant and servient tenements.—The burthens imposed upon land by the creation of incorporeal rights in the nature of easements and profits à prendre may be denominated conventional servitudes, or services imposed by express or implied contract upon one estate or tenement in the hands of one person for the benefit of another estate or tenement in the hands of another person. Most of the rules and principles of the Roman law regulating the exercise and enjoyment of incorporeal rights, under the denomination of servitudes, have been incorporated into the European systems of jurisprudence founded on the Roman code. The property or tenement to which the incorporeal right or privilege is annexed, and by which it is benefited, is termed the dominant tenement, and that on which the burthen is imposed, and which ministers to the enjoyment of the right, the servient tenement. In the "Institutes" servitudes are called the services of city estates, "because," it is said, "we call all edifices city estates, although they are built upon farms or villages. And it is required by city services that neighbours should bear the burthen of neighbours; and by such services one neighbour may be permitted to place a beam upon the wall of another; may be compelled to receive the droppings and currents from the gutter-pipes of another man's house upon his own house, area, or sewer, or may be exempted from receiving them, or may be restrained from raising his house in height, lest he should darken the habitation of his neighbour" (y).

In the Code Napoléon we read that a servitude is a burthen imposed

(t) *Fitch v. Rawling*, 2 H. BL. 393.

(u) Post, pp. 39-42.

(x) *Blewett v. Tregoning*, 3 Ad. & E.

575. *Gateward's case*, 6 Co. 60a. *Grim-*

stead v. Marlowe, 4 T. R. 717.

(y) Instit. lib. 2, tit. 3, s. 1.

upon one estate for the use and benefit of another estate, belonging to another proprietor, and that it is derived either from the natural situation of places, or from obligations imposed by law, or from agreements between proprietors (x).

Bracton, in his books of the laws and customs of England, draws largely from the Roman law when treating of the nature and origin of servitudes, by which, as he says, "*Domus domui, rus ruri, fundus fundo, tenementum tenemento subjungatur*" (a). Among the different servitudes with which the estate of one proprietor may be burthened for the benefit and convenience of another, he enumerates rights of depasturing cattle, rights of common, of cutting and carrying away turf, or digging for and gathering minerals, stones, or sand, rights of way, rights of drawing water from a neighbouring well, rights of watercourse, or of a passage for water through another's land, rights of hunting thereon, rights of estover, or of cutting wood for burning in the dwelling-house, or for building, or repairs; all of which servitudes, he tells us, were originally imposed upon land by the will, or ordering, or consent of the lord, or have grown up, and have become appurtenant to property, without having been expressly constituted, through long-continued, peaceable, and uninterrupted enjoyment.

The long-continued exercise of the privilege on the one side, and the sufferance and endurance of it on the other, must not, he observes, be due to force or intimidation. If it has been exercised and enjoyed by stealth, or if the privilege has been sought for and has been conceded as a kindness and matter of favour, to be enjoyed during the good pleasure of the grantor, it will fail to create a servitude (b).

Unlimited claims in the nature of easements, profits and servitudes.—There can be no prescriptive right in the nature of an easement or servitude so large as to preclude the ordinary uses of property by the owner of the lands affected by the privilege, and extinguish or destroy all the profits or produce ordinarily derivable from the soil. Therefore an unlimited claim of a right to go at all times and in all directions over every portion of a close for purposes of recreation and amusement is bad. Such an easement is claimable only by the inhabitants of particular villages over open and uninclosed village-greens and village-playgrounds, which have been immemorially dedicated to the recreation and amusement of the inhabitants of the village (c). Claims of a right of profit à prendre *in alieno solo* must in like manner, in order to be valid, be made with some limitation and restriction. Where therefore a defendant claimed a

(x) Code Nap., No. 687-689.

(a) Bract. de Leg. et Consuet. Angliæ, lib. 4, fol. 221.

(b) Ib. lib. 4, fol. 220-222.

(c) Dyce v. Lady James Hay, 1 Macq. 305.

prescriptive right as the occupier of a brick-kiln, to dig and carry away from an adjoining close of the plaintiff as much clay as was required for the making of bricks in the brick-kiln, it was held that an unlimited claim and demand of this nature upon the soil of the plaintiff could not be sustained, for it would, as claimed, enable the defendant "to take all the clay, or, in other words, to take from the plaintiff the whole close" (*d*).

Of the servitude of maintaining and repairing sea-walls, ditches, and sluices.

—Every person who accepts a grant of land from the crown, accompanied by a command or direction to keep up, repair, and maintain certain buildings, sea-walls, ditches, and sluices, takes the land subject to the servitude imposed thereon; and if any private individual sustains a private and peculiar injury from the non-repair of the sea-walls, &c., he is entitled to an action against the grantee or his assigns, failing to fulfil the duty imposed upon him or them (*e*).

Of customary rights of fishing, and driving stakes for nets in the sea-shore.

—The land between ordinary high-water mark and low-water mark belongs to the crown in the absence of proof of a grant of such land to a lord of a manor or to a private person (post, ch. 5, s. 2); but various customary and prescriptive rights and privileges over the sea-shore have grown up and been acquired by the public, and by communities and private individuals, by reason of immemorial usage and enjoyment. Where an action of trespass was brought against a defendant for digging in the plaintiff's land, and the defendant pleaded that the *locus in quo* was four acres of land adjoining the sea, and that all the men of Kent, from time immemorial, have used when they have fished in the sea to dig in the land adjoining, and pitch stakes for hanging their nets to dry, it was held that such a custom, confined to the sea-shore, might be good; for observes Clarke, C. J., "If I have land adjoining the sea, so that the sea ebbs and flows on my land, when it flows every one may fish in the water which has flowed on my land, for then it is parcel of the sea, and in the sea every one may fish of common right; and when the sea has ebbed, then in this land which was flowed before, peradventure he may justify his digging, for this land is of no great profit" (*f*).

Customary and prescriptive rights of bathing on the sea-shore.—There is no general common law right of bathing in the sea, and passing over every part of the shore for that purpose, independently of usage and custom; but such a right may exist by prescription or custom, and may be gained by individuals, or by the permanent or temporary occupiers of houses on the sea-coast, or by the inhabitants of any village, parish, or district. The

(*d*) *Clayton v. Corby*, 5 Q. B. 410, 422.

(*e*) *Henly v. Mayor of Lyme*, 5 Bing.

(*f*) 8 Edw. 4, 19. Bro. Abr. Customs,

existence and the extent of the right are to be collected in this, as in other instances of customary and prescriptive rights (post, p. 39), from the manner in which the particular portions of the sea-shore throughout the kingdom have from time immemorial been used. "The right of bathing in the sea," observes Best, J., "is as beneficial to the publick as the right of fishing, and unless I felt myself bound by an authority as strong and clear as an act of parliament, I would hold, on principles of publick policy, I might say, publick necessity, that the interruption of free access to the sea is a *publick nuisance*. In the first ages of all countries the sea and its shores were left open to publick use. In all countries it has been matter of just complaint that individuals have encroached on the rights of the people. In England, our ancestors put the publick rights in rivers under the safeguard of *Magna Charta*. If the principle of exclusive appropriation be extended so far as to touch the right of walking over the barren sands of the sea-shore, it will take from the people what is essential to their welfare, whilst it will give to individuals only the hateful privilege of vexing their neighbours. It has been said, that lords of manors should have a right to prevent bathing; that they might hinder persons from doing it in places of publick resort. Magistrates are armed with authority to bring to punishment such as bathe indecently, and I would rather rely on disinterested and responsible magistrates than on an interested and irresponsible lord of a manor" (g).

By the Town Police Clauses Act, 10 & 11 Vict. c. 89, s. 69, it is enacted, that where any part of the sea-shore, or strand of any river, used as a public bathing-place is within the special act, the commissioners may make bye-laws for fixing the stands of bathing-machines, and the limits within which persons shall bathe; also for preventing any indecent exposure of the persons of the bathers, for regulating the manner in which the bathing-machines shall be used, the charges to be made for the same, and the distance at which boats let to hire are to be kept from persons bathing.

This statute only applies to places of public resort for bathing; but unjustifiable attempts have been made under it to prevent bathing from parts of the sea-coast which have been immemorially used as places of private resort for bathing, and serious collisions with the police have resulted from this arbitrary interference with the liberty of the subject (h).

(g) *Blundell v. Catterall*, 5 B. & Ald. 207.

(h) See *Griffiths v. Coleman*, 4 H. & N. 265. Bye-laws have been made prohibiting bathing, except from a machine, along the whole coast between Folkestone

and Sandgate, in order that a few sentimental young ladies may fearlessly read novels in secluded nooks, or indulge their taste for sea anemones among the rocks; and that the owner of the bathing-machines may be properly protected.

Of rights of common.—A right of common being, as we have seen, a profit à prendre, is claimable only by grant or by prescription. It is either appendant, appurtenant, or in gross.

Common appendant is a right annexed to arable land of depasturing on the lord's waste beasts that serve the plough, such as horses and oxen, or which manure the land, such as kine and sheep. "The reason for common appendant," observes Willes, C. J., "appears to be this, that as the tenant would necessarily have occasion for cattle not only to plough, but likewise to manure his own land, he must have some place to keep such cattle in whilst the corn is growing on his own arable land, and therefore of common right, if the lord had any waste, he might put his cattle there when they could not go on his own arable land. This right is so necessarily incident to the land, that it cannot be severed therefrom; and therefore if the land be divided never so often, every little parcel is entitled to common appendant. But the tenant can only have the right of common for such cattle as are levant and couchant on his estate; that is, for such and so many as he has occasion for to plough and manure his land, in proportion to the quantity thereof. And it is plain that he cannot have the right for cattle which he borrows, unless he make use of them all the year to plough or manure his land" (f). Although this kind of common is regularly appendant only to arable land, yet it may be claimed as appendant to a manor or farm containing pasture, meadow, and wood; for it shall be presumed to have been all originally arable land, though afterwards converted into meadow pasture, &c. (k).

Common appurtenant is a right derived from the possession or occupation of land of depasturing a limited number of beasts upon the lord's waste, or upon the uninclosed land of an adjoining proprietor, and is claimable by grant or by prescription (l). The right is limited to beasts levant and couchant upon the land to which the right is appurtenant, so that a claim to a right of common appurtenant "*sans* number" is bad. The number of cattle which can be "levant and couchant" upon the estate is the number which the produce of the land is capable of maintaining throughout the winter. "If my land to which I claim common belonging can yield me stover to find a hundred cattle in winter, then shall I have common in summer for a hundred cattle in the land out of which I claim common, and so for more or fewer proportionably" (m). If the commoner has turned more cattle upon the common than the winter eatage of his ancient tenement, together with the hay and other

(f) *Bennett v. Reeve*, Willes 231; Bac. Abr. COMMON A. 1.

(k) Bac. Abr. COMMON A. 1.

(l) *Cowlam v. Slack*, 15 East, 107.

(m) *Smith v. Bonsall*, Golds. 117. *Cole v. Foxman*, Noy's R. 80. *Cheesman v. Hardham*, 1 B. & Ald. 711.

produce obtained from it during the summer, is capable of maintaining, he has exceeded his legal rights, and is liable to an action (n).

Common in gross is a right of common of pasture not appertaining to any land, and is claimable by grant or prescription (o). In prescribing therefore for common in gross, "one does not lay seisin of any land, but says that he and his ancestors, whose heir he is, &c., from time whereof, &c., have had common in the place where, &c., for all their cattle, without relation to any land, and without saying levant and couchant, because there is no land on which they can be levant and couchant, or to which the common can be appurtenant, wherefore a prescription for common in gross without number is good" (p).

Common of shack, observes Bayley, J., "is a right of persons occupying arable land uninclined to turn out their cattle at certain seasons to feed promiscuously over the whole open field. If there were no common right of this sort, every man would be bound to keep his cattle upon his own land, which would be productive of great inconvenience, and in many instances would be impossible. In order to obviate this, every man's cattle are allowed the full range of the whole field; but the number which each man is at liberty to turn out is limited to that which the land of each individual is capable of supporting" (q).

Right of common pur cause de vicinage.—To establish a common *pur cause de vicinage*, it must be proved that the inhabitants have usually inter-communed with one another; the beasts of the one straying into the other's fields without any molestation on either side. There must not only be absence of fence, but mutual acquiescence, and an immemorial allowance of the straying of the cattle (r).

Common of turbary, or the liberty or privilege of cutting and carrying away turf, is in general appendant to an ancient dwelling-house, and the right is limited to such a quantity as is sufficient to burn in the ancient chimneys and fire-places of the house (s); consequently a claim to cut and carry away turf for sale (t), or to make grass-plots or paths, cannot be supported (u).

Common of estovers, or the liberty or privilege of cutting down and carrying away trees, or loppings of trees, shrubs, and underwood, in another man's woods, coppices, or forests, for burning, building, or inclosing, is in general appendant to an ancient dwelling-house, and is

(n) *Whitelock v. Hutchinson*, 2 Mood. & Rob. 205.

(o) Co. Litt. 122a.

(p) *Mellor v. Spateman*, 1 Wms. Saund. 346.

(q) *Oheesman v. Hardham*, 1 B. & Ald.

711. *Sir Miles Corbet's case*, 7 Rep. 57.

(r) *Clarke v. Tinker*, 10 Q. B. 618.

(s) 6 Co. 36b, 37a. *Dean, &c. of Ely*

v. *Warren*, 2 Atk. 189.

(t) *Valentine v. Penny*, Noy's R. 145.

(u) *Wilson v. Willes*, 7 East, 121.

claimable by grant or by prescription, except in the case of copyholders, who may, it seems, claim by custom (*x*).

The nature and extent of the right, and the periods of the year for the exercise and enjoyment of it, are to a great extent defined and controlled by local custom and usage. According to Bracton, the right must be exercised with reason and moderation, according to the size of the wood or waste in which the right is to be exercised, and the size of the tenement to which it is annexed (*y*). The estovers must be expended within or upon the house, and cannot lawfully be sold or exchanged; nor can the right be enlarged or extended. A tenant having a right to estovers for the repair of his dwelling-house and farm-buildings, cannot "enlarge his house with the timber, nor board the sides of a barn which had muddle walls, or the like before" (*z*). If a man has estovers belonging to his house, and he builds new chimneys where there were no chimneys before, he cannot use the estovers in the new chimneys (*a*). But if he sets up a new chimney where an old one was before, he shall have his estovers for the new chimney (*b*).

Inconsistent incorporeal rights.—Where there are two distinct rights, claimed by different parties, which encroach on each other in the enjoyment of them, the question is, which of the two rights is subservient to the other? It may be either the lord's right, which is subservient to the commoners', or the commoners', which is subservient to the lord's. In general, one would say that the lord's is the superior right, because the property of the soil is in him; but if the custom established by evidence show that it is subservient to the commoner's, then he cannot use the common beyond that extent; otherwise he subjects himself to an action for the excess (*c*).

Of the creation by grant of incorporeal rights to be exercised in alieno solo.—A parol license or permission to go upon another man's land will, so long as it has not been countermanded, justify an entry upon the land; but it can confer no indefeasible right, and may be recalled at the pleasure of the grantor, unless the license or permission is under seal, in which case it amounts to a grant of an incorporeal hereditament. "A right of passage for waste water through an artificial drain or watercourse in another man's land, where the party claiming the right has no interest in the land through which the water flows, or ought to flow, is an incorporeal right lying in grant, and is claimable only by deed or by prescription" (*d*). Therefore a mere parol permission to cut a drain, or

(*x*) Bract. fol. 231. *Selby v. Robinson*,
2 T. R. 758.

(*y*) Bract. fol. 231.

(*z*) *Earl of Pembroke's case*, Clayt. 47.

(*a*) *Luttrell's case*, 4 Co. 87a.

(*b*) *Cotard v. Wingfield*, 2 Leon 44.

(*c*) *Buller, J., Bateson v. Green*, 5 T. R.
416.

(*d*) *Hewlins v. Shippam*, 5 B. & C.
229.

make a watercourse, and use it for the passage of water, may be revoked, and the drain or watercourse stopped up by the proprietor, who has given the permission, and through whose land the water runs (e). "In the case of a parol license," observes Alderson, B., "to come on my land, and there to make a watercourse for water to flow through my land, there is no valid grant of the watercourse. The license remains a mere license, capable of being revoked; but if the license were granted by deed, then the question would be on the construction of the deed, whether it amounted to a grant of the watercourse; and if it did, then the license would be irrevocable" (f). "A dispensation or license," observes Vaughan, C. J., "properly passeth no interest, nor alters or transfers property in any thing, but only makes an action lawful, which without it had been unlawful. Thus a license to hunt in a man's park, and carry away the deer killed to his own use; to cut down a tree in a man's ground, and to carry it away the next day after to his own use, are licenses as to the act of hunting and cutting down the tree; but as to the carrying away of the deer killed and tree cut down, they are grants" (g).

A mere license of pleasure, such as a license to hunt over a man's land, whether made by deed or simple contract, is revocable; but a license to hunt and carry away the game killed amounts, if under seal, to a grant, and cannot be revoked (h). Care, however, must be taken to distinguish between a license amounting to a grant of an easement to be exercised and enjoyed by the grantee of such license upon the grantor's land, and a license to the grantee to use his own land in a way which, but for an easement claimed thereon by the grantor, he would have had an undoubted right to use it (i).

Grants of the privilege of a free passage of light and air to newly-opened windows across the adjoining land of the grantor must be authenticated by deed, or established by implied grant, or by prescription (k). If a parol license or permission is granted to a neighbour to open a window overlooking the adjoining ground of the defendant, the parol license will not prevent the defendant from building a wall on his own land, and thereby shutting out the light and air from the newly-opened window. If, therefore, permission not under seal is given to a defendant, to open a window in his house overlooking the plaintiff's garden, and the plaintiff, after the window has been opened, finding that his privacy has been invaded, builds a wall on his own ground which blocks up the offending

(e) *Cocker v. Cowper*, 1 Cr. M. & R. 421. *Fentiman v. Smith*, 4 East, 108.

(f) *Wood v. Leadbitter*, 13 M. & W. 845. *Lee v. Stevenson*, 27 Law, J., Q. B. 283.

(g) *Thomas v. Sorrell*, Vaughan, 351.

(h) Bro. Abr. LICENSES, Alderson, B., *Wood v. Leadbitter*, 13 M. & W. 838.

(i) *Winter v. Brochwell*, *Liggins v. Inge*; post PAROL ABANDONMENT OF INCORPOREAL RIGHTS.

(k) Post, pp. 39, 47, 48.

window, and the defendant then enters upon the plaintiff's land, and knocks the wall down, he will be responsible in damages for a trespass, and cannot justify his entry upon the plaintiff's land under colour of the parol license to open the window (l).

Of the transfer from one person to another of incorporeal rights in the nature of easements and profits à prendre.—A grant of an easement or a profit à prendre to a person who has no estate or interest in land to which the incorporeal right may be annexed is a mere personal contract, operative only between the immediate parties thereto, and does not bind the land in the hands of persons to whom it may be subsequently conveyed. If the owner of an estate of inheritance in lands, for example, covenants with a stranger who has no interest in the soil, that he shall have certain specified incorporeal rights, to be used or enjoyed over the land of the covenantor, this covenant will not bind the land in the hands of purchasers to whom the estate of the covenantor may be subsequently conveyed, and who are no parties to the deed of covenant (m). "Incidents of a novel kind cannot be devised and attached to property at the fancy or caprice of the owners; for great detriment would arise, and much confusion of rights, if parties were allowed to invent new modes of holding and enjoying real property, and to impress upon their lands and tenements a peculiar character, which should follow them into all hands, however remote" (n).

The benefit and burthen of an incorporeal right to be exercised and enjoyed over land, and the consequent servitude, cannot be transferred from one person to another, except when it is appendant or appurtenant to an estate or interest in land, and accessorial to the use and enjoyment of landed property. A right of way unconnected with the enjoyment or occupation of land cannot be annexed as an incident to an estate; nor can a way appendant to a house or land be granted away or made a way in gross, for no one can have such a way but he who has the land to which it is appendant. It is not in the power of an owner of land to create rights not connected with the use or enjoyment of land, and annex them to it, nor can he subject the land to a new species of burthen, so as to bind it in the hands of an assignee. "It would be a novel incident annexed to land, that the owner and occupier should, for purposes wholly unconnected with that land, and merely because he is owner and occupier, have a right of way over other land; and a grant of such a privilege or easement can no more be annexed, so as to pass with the land, than a covenant for any collateral matter" (o).

(l) *Bridges v. Blanchard*, 1 Ad. & E. 549. *Wood v. Leadbitter*, *Lee v. Stevenson*, ante, p. 24.

(m) Addison on Contracts, pp. 971–

974, 4th edit.

(n) *Ld. Brougham, Keppel v. Bailey*, 2 Myl. & K. 586.

(o) *Ackroyd v. Smith*, 10 C. B. 188.

"Private ways over another man's grounds," observes Blackstone, "may be grounded on a special permission, as when the owner of the land grants to another a liberty of passing over his grounds to go to church, to market, or the like: in which case the gift or grant is particular, and confined to the grantee alone; it dies with the person, and the grantee cannot assign over his right to any other" (*p*). Thus a license to a man to hunt in my park or to walk in my orchard extends but to himself. And a way granted to church over any land extends not to any other but the grantee himself (*q*), and therefore he may not give or grant this to another (*r*). But if the incorporeal right is appendant or appurtenant to a house or land, and accessorial to the use and enjoyment thereof, it passes with the tenement to which it is annexed to the successive assignees and owners thereof by a grant of the tenement, so that the benefit and the burthen of the exercise and enjoyment of the incorporeal right will accompany the dominant and servient tenements into the hands of the several successive assignees and owners thereof, so long as such dominant and servient tenements remain vested in the hands of separate proprietors (*s*). Thus a right of common appendant or appurtenant to a messuage or lands passes, as we have seen, by a grant of the messuage or land (*t*).

"If a man be seized of a house in right of his wife, and another grants to the husband and his heirs to have sufficient estovers to burn in the same house, in that case the estovers are appurtenant to the house, and shall descend to the issue of the husband and wife. So, if one have a house on the part of his mother, and one grants to him that he and his heirs shall have competent housebote to be burnt in the same house, this is appurtenant to the house; and although it be a new purchase, it shall go with the house to the heir on the part of the mother" (*u*).

When copyholders for life, according to the custom, have used to have common in the waste of the lord of the manor, or estovers in his woods, or any other profit à prendre in any part of the manor, and afterwards the lord aliens the wastes or woods to another in fee, and afterwards grants certain copyhold houses and lands for lives, such grantees shall have common of pasture, or common of estovers, &c., notwithstanding the severance, for the title of the copyholder is paramount the severance; and the custom unites the common or estovers, which are but accessaries or incidents, as long as the house or land, being principal, is maintained by the custom; which customary appurtenances are not appertaining to the estate of the lord, for he is the owner of the freehold and inheritance of all

(*p*) 2 Bl. Comm. 35.

(*q*) Wingate's Maxims, 379.

(*r*) Shep. Touch. 239.

(*s*) See post as to the merger and extinguishment of easements and profits

by unity of ownership of the dominant and servient tenements.

(*t*) *Sacheverell v. Porter*, 2 Roll. Abr. 60, p. 4; ante, pp. 21, 22.

(*u*) *Sym's case*, 8 Co. 54a.

the manor, but they are appertaining to the customary estate of the copyholder, after the grant made unto him; which profit à prendre being due by custom to the copyhold tenement, notwithstanding the fine or feoffment of the waste or woods made by the lord remains, and is preserved by the custom, which is, as hath been said, the title of the copyholder, and is paramount to the severance; but if the copyholder had derived his interest from the estate of the lord, then clearly, by the feoffment, fine, &c., of the lord, all those who claim afterwards shall be barred of any profit à prendre in the same waste or woods" (x).

By the French code it is declared to be lawful for proprietors to establish over their property, or in favour of their property, such servitudes as seem good to them, provided the services established be not imposed either on a person, or in favour of a person, but only on an estate, and for the benefit of an estate (y).

Presumption of a grant from long-continued uninterrupted user and enjoyment as of right.—To raise a presumption of a grant from long-continued uninterrupted enjoyment, the enjoyment must have been open and notorious, and exercised as a matter of right, and not of grace and favour (ante, p. 18). Where, therefore, the enjoyment can be satisfactorily accounted for, and is consistent with there having been no grant or conveyance, there is no ground for presuming one; and it is necessary that the jury should be satisfied that a conveyance of the right has, in fact, been executed. In the case of the enjoyment by one man of a right of common, or profit à prendre in the land of another, and in every user of a way, the original enjoyment must have been unlawful, unless the privilege had been exercised with the sanction and authority of the owner of the soil, and can only be accounted for on the supposition that a grant had been made; and when the enjoyment had been long continued without interruption a grant was presumed; but when the enjoyment of the privilege is accounted for, and is consistent with the fact of there having been no grant, the presumption does not arise (z).

According to the ancient law of prescription, the enjoyment was not uninterrupted, wherever it was had and exercised in spite of the remonstrance or prohibition of the owner of the fee (a). And whenever there was evidence to show that the user and enjoyment were had and exercised by permission, and grace and favour, there was no user and enjoyment as of right, and no prescriptive title could be gained thereby,

(x) *Swayne's case*, 8 Rep. 63b. *Benson v. Chester*, 8 T. R. 401.

(y) Cod. Civ. No. 686.

(z) *Doe v. Reed*, 5 B. & Ald. 236. *Livett v. Wilson*, 3 Bing. 118. *Boyle v. Tamlyn*, 6 B. & C. 337.

(a) "Interrumpi poterit per denuntiationem et impetrationem diligentem, et per talem interruptionem nunquam acquirit possidens ex tempore liberum tenementum."—Bract. lib. 4, fol. 51, cap. 22.

however notorious and long-continued might have been the user and enjoyment (*b*).

The general principle with regard to prescriptive rights founded on the presumption of a grant is, that a grant will not be presumed against an ignorant man, and, therefore, if an easement, or profit à prendre, has been enjoyed on land let on lease, the landlord is not to be prejudiced in his rights, and the inheritance burthened through the *laches* or acquiescence of the tenants in matters affecting the inheritance, without the knowledge, and privity, and sanction of the landlord (*c*). "The foundation," observes Lord Ellenborough, "of presuming a grant against any party is, that the exercise of the adverse right on which such presumption is founded was against the party capable of making the grant, and that cannot be presumed against him, unless there were some probable means of his knowing what was done against him" (*d*). But when the user and enjoyment are had and exercised under circumstances of notoriety, a jury may infer the landlord's knowledge and acquiescence in such user and enjoyment. Thus, where the lessees of a fishery had for sixty-four years been in the constant habit of landing their nets openly on a river-bank in the occupation of a tenant, and had from time to time sloped and pared the bank, and exercised various other acts of ownership upon the land, it was held that a jury was justified in inferring that the landlord knew of and acquiesced in the enjoyment of the easement (*e*). And where there had been an uninterrupted enjoyment for thirty-eight years of the free access of light and air to windows over and across land held on lease, it was held that the landlord's knowledge of and acquiescence in the enjoyment of the visible and apparent easement was fairly to be presumed, in the absence of evidence to the contrary (*f*).

If the user and enjoyment have been had and exercised with the sufferance and permission of the tenant, but in spite of the remonstrance, protest, or objection of the owner of the fee, no right can be gained by such an enjoyment, for there can be no presumption of a grant under such circumstances.

Proof of immemorial enjoyment of the privilege claimed was, in ancient times, essential to raise the legal presumption of a grant; but for a long series of years before the passing of the Prescription Act (post, p. 39),

(*b*) "Si autem precaria fuerit et de gratiâ, quæ tempestive revocari possit vel impetive, ex longo tempore non acquiritur jus."—Bract. lib. 4, fol. 221, ante, p. 18.

(*c*) See the observations of Lord Wynford, *Benest v. Pipon*, 1 Knapp, P. C. 70. *Davies v. Stephens*, 7 C. & P. 570. "Si autem fuerit seisina clandestina, scilicet

in absentia dominorum vel illis ignorantibus, et si scirent essent prohibitori, licet hoc fiat de consensu vel dissimulatione ballivorum, valere non debet."—Bract. lib. 4, fol. 221; lib. 2, fol. 52.

(*d*) *Daniel v. North*, 11 East, 374. *Runcorn v. Cooper*, 5 B. & C. 701.

(*e*) *Gray v. Bond*, 5 Moore, 534.

(*f*) *Cross v. Lewis*, 2 B. & C. 686.

judges were in the habit, for the furtherance of justice and the sake of peace, to leave it to juries to presume an ancient grant of an easement or profit à prendre from an uninterrupted enjoyment of the privilege as of right for twenty years, adopting that period by analogy to the Statute of Limitations.

Implied grants of easements visibly appertaining to the principal thing granted, and accessorial to the use and enjoyment thereof.—If a landed proprietor has annexed peculiar qualities and incidents to different parts of his estates, so that one portion of his land becomes visibly dependant upon another for the supply of water, light, or air, the qualities or incidents thus manifestly imprinted upon the property pass with the lands to which they are annexed to the grantees, as accessorial to the beneficial use and enjoyment of such lands. If one erect a house and build a conduit thereto in another part of his land, and convey water by pipes to the house, and afterwards sell the house with the appurtenances without the land, or sell the land without the house to another, the conduit and pipes pass with the house, because they are necessary and appendant thereto; and the purchaser of the house shall have liberty by law to dig in the land for amending the pipes or making them new, as the case may require. So it is if a lessee for years of a house and land erect a conduit upon the land, and after the term determines, the lessor occupies them together for a time, and afterwards sells the house with the appurtenances to one, and the land to another, the vendee shall have the conduit and the pipes, and liberty to amend them. "But," by Popham, C. J., "if the lessee erect such a conduit, and afterwards the lessor during the lease sell the house to one and the land wherein the conduit is to another, and after that the lease determines, he who hath the land wherein the conduit is may disturb the other in the using thereof, and may break it, because it was not erected by one who had a permanent estate or inheritance, nor made one by the occupation and usage of them together by him who had the inheritance. So it is if a disseisor of a house and land erect such a conduit, and the disseisee re-enter, not taking consuance of any such erection, nor using it, but presently after his re-entry sells it, the house to one and the land to another, he who hath the land is not compellable to suffer the other to enjoy the conduit" (g).

Where the owner of two or more adjoining houses sells or conveys one of the houses, the purchaser of the house is entitled to the benefit of all the drains from his house, and is subject to all the drains necessarily to be used for the enjoyment of the adjoining house, and that without any

(g) *Nicholls v. Chamberlain*, Cro. Jac. 121. *Brown v. Nicholls*, Moore, 682. *Archer v. Bennett*, 1 Lev. 131. *Hinch-*

liffe v. Earl Kinnoul, 5 Bing. N. C. 23. *Oanham v. Fisk*, 2 Cr. & J. 126. *Miner v. Gilmour*, 33 Law, T. R., H. L. 98.

express reservation or grant: if that were not so, it would enable the vendee of any one house to stop up the system of drainage made for the benefit and necessary occupation of the whole (*h*). If a man is possessed of a house, and there is actually a way used, or an apparent visible road or path manifestly intended to be used by the occupiers of the house, a grant or lease of the house will carry with it the right to use the way (*i*).

So by the French law, if the proprietor of two heritages between which there exists an apparent sign of servitude disposes of one of the heritages, without making any stipulation in the conveyance respecting the servitude, it continues to exist, actively or passively, in favour of the heritage alienated or upon it (*k*). And by apparent signs of an easement or servitude must be understood not only those which must necessarily be seen, but those which may be seen or known on a careful inspection by a person ordinarily conversant with the subject (*l*).

Privileges and servitudes which pass as accessorial to the use and enjoyment of the principal thing granted—Omne accessorium sequitur suum principale.—In accordance with the maxim, "Quando aliquis aliquid concedit, concedere videtur et id, sine quo res concessa uti non potest," it has been held that by the grant of the use of a pump the grantee has a right to enter upon the grantor's land to repair the pump, although neither the soil itself nor the pump on which it stands be granted to him; and that if a man gives me a license under seal to lay pipes of lead in his land to convey water to my cistern, I may afterwards enter and dig the land to mend the pipes, though the soil belongs to another, and not to me (*m*). If one grants his trees, the grantee may enter upon his land for the cutting down and carrying them away. And if a growing crop of grass is sold to be cut down and made into hay when it arrives at maturity, the purchaser has a right by implication of law to make the grass into hay on the land (*n*). If a landowner has granted to another a right to dig coal-pits in his land, and to take and carry away coal, all things necessary for the exercise and enjoyment of the right pass therewith to the grantee. He has a right, therefore, to erect sheds and steam-engines, and fix such machinery as may be necessary to drain the coal-pits, draw up the coals and iron, and work the coal-field, although the grant of the incorporeal right may be silent as to any such erections (*o*).

By the French law, "he to whom a servitude is due has a right to form all the works necessary to make use of and preserve the servitude.

(*h*) *Pyer v. Carter*, 1 H. & N. 916; 26 Law, J., Exch. 258.

(*i*) *Pollock, C. B.*; *Glave v. Harding*, 27 Law, J., Exch. 292.

(*k*) *Cod. Civ. Art. 694.*

(*l*) *Pyer v. Carter*, 1 H. & N. 922.

Miner v. Gilmour, 33 Law, T. R., H. L. 98.

(*m*) *Pomfret v. Ricroft*, 1 Saund. 322a. 328; ante, p. 29. *Liford's case*, 11 Co. 52a.

(*n*) 1 Roll. Abr.; *Dismes X.*, pl. 23.

(*o*) *Dand v. Kingscote*, 6 M. & W. 196.

These works are at his own expense, and not at that of the proprietor of the estate subjected to the servitude, unless the deed establishing the servitude declare the contrary" (p).

Implied grant of right of way as accessorial to the beneficial use and enjoyment of lands and tenements—Ways of necessity.—Whenever one man grants land to another to which there is no access but over the land of the grantor, or the land of a stranger, which cannot lawfully be traversed, the grantee has a right of way over the grantor's land, as a way by necessity, and the grantor shall assign the way where he can best spare it. And if the owner of two closes, having no way to one of them but over the other, parts with the latter without reserving the way, it will be reserved to him by law as a way of necessity (q).

Where one sold land, and afterwards the vendee, by reason thereof, claimed a way to it over part of the plaintiff's land, there being no convenient way adjoining, it was held that he might well justify the using thereof, for otherwise he could not have any profit of his land: and if a man hath four closes lying together, and sells three of them, reserving the middle close, and hath not any way thereto but through one of those which he sold, although he reserved not any way, yet he shall have it as reserved unto him by the law (r). A way by necessity, when the nature of it is considered, will be found to be nothing else but a way by grant. It derives its origin from a grant; for there seems to be no difference when a thing is granted by express words, and where by operation of law it passes as incident to the grant. In both cases the grant is the foundation of the title, and it is as necessary to set forth the title to a way of necessity as it is to a way by grant (s).

What passes by implication of law as accessorial to a grant of a right of way or watercourse.—Every grantee of a right of way, or of the right of passage for waste water through an artificial drain or watercourse, extending from the land of the grantee through the land of the grantor, is bound to maintain and repair the way and the watercourse, if he wishes to use them, unless the grantor himself has expressly undertaken the performance of that duty. The grantee, therefore, has a right to go upon the land over which the easement is enjoyed to do the necessary repairs (t).

Under a general grant of a right of way, with liberty to make and lay

(p) Cod. Civ. Liv. 2, tit. 4, art. 697, 698.

(q) 2 Roll. Abr.; GRAUNT, Z., pl. 17, 18. *Houlton v. Frearson*, 8 T. R. 50. *Morris v. Edgington*, 3 Taunt. 80. *Pinnington v. Galland*, 9 Exch. 12; 22 Law, J., Exch. 349. *East. Co. Rail. Co. v. Dor-*

ling, 28 Law, J., C. P. 202.

(r) *Clark v. Cogge*, Cro. Jac. 170.

(s) 1 Wms. Saund. 323a, 323b. *Proctor v. Hodgson*, 10 Exch. 824; 24 Law, J., Exch. 195.

(t) *Taylor v. Whitehead*, 2 Doug. 745; post, ch. 3.

causeways, and use the same with waggons and carriages, and carry coals, it was held that the grantee had a right to construct and use framed waggon-ways, if they were reasonably necessary for the profitable conveyance of coals, but that he was not entitled to make a transverse road across the land, for purposes foreign to the conveyance of coals (u). And where there was a grant of a right of way as a foot or carriage way, with all liberties, powers, and authorities necessary to the enjoyment thereof, it was held that the grantee of the way might lay down a flagstone upon the land in front of his house, over which the way passed, if the flagstone was reasonably necessary for his enjoyment of the way, and the laying of it down did not in anywise obstruct the carriage-road, or cause any injury or inconvenience to the grantor (x).

By the civil law every owner who was entitled to a way, or the free passage of running water from his dominant tenement through an adjoining servient tenement, was entitled to enter upon the servient lands to repair the way or watercourse when necessary, and bring thereon the materials necessary for the purpose, making compensation to the owner of the servient tenement for all damage done in the progress of the repairs (y).

Right of towing on the banks of a navigable river.—There is no general common law right of towing along the banks of a navigable river (z); but such a right may be acquired by grant, custom, or prescription (a).

When an easement of support from the adjoining land of the grantor passes as accessory to a grant of land or of a tenement.—If a landowner sells a portion of his land avowedly and expressly for building, or for the construction of a road or railway, he impliedly grants to the purchaser, in the absence of statutory provisions to the contrary, an easement of lateral support from his adjacent land; and if the vendor reserves to himself the right to the minerals underneath the surface, he nevertheless impliedly grants all such adjacent and subjacent support as is reasonably necessary to enable the purchaser to erect and maintain his buildings, road, or railway; and neither the vendor, nor those who claim under him, can afterwards excavate so as to endanger this support and derogate from the grant. But if land for the making of a railway has been purchased by a railway company, constituted under the provisions of the Railway Clauses Consolidation Act, the company is not entitled to adjacent and subjacent support for the bridges, buildings, embankments, and works of the rail-

(u) *Senhouse v. Christian*, 1 T. R. 569.

(x) *Gerrard v. Cooke*, 2 B. & P., N. S. 115.

(y) *Gale's Easements*, 325a.

(z) *Ball v. Herbert*, 3 T. R. 253.

(a) As to the right to the soil of towing paths, see post, ch. 5, s. 1.

way, unless the right to such support is purchased, or compensation has been given and accepted in respect of it (post, p. 34).

How far this adjacent and subjacent support must extend is a question which in each particular case will depend on its own special circumstances. If the surface of the land granted is merely a common meadow, or a ploughed field, the necessity for support will be much less than if it were covered with buildings. All which a grantor of the surface can be reasonably considered to grant or warrant, by implication of law, is such a measure of support, subjacent and adjacent, as is necessary for the land in its condition at the time of the grant, or to enable the grantee to use it for purposes for which it was known to be required.

"Thus, if I grant a meadow to another retaining the minerals under it, and also the adjoining land, I am bound so to work my mines and to dig my adjoining lands as not to cause the meadow to sink or fall over. But if I do this, and the grantee thinks fit to build a house on the edge of the land he has acquired, he cannot complain of my workings and diggings if by reason of the additional weight he has put on the land they cause his house to fall. If, indeed, the grant is made expressly to enable the grantee to build his house on the land granted, then there is an implied grant and warranty of support, subjacent and adjacent, as if the house had already existed (*b*). And if the additional weight of the building has in nowise caused the surface to sink, and the land would have sunk if no building had been put upon it, the excavator or miner is responsible for the damage done both to the land and buildings" (ante, p. 9).

Extinguishment by statutory enactment of the right of support to lands weighted by railways and canals.—By the Railway Clauses Consolidation Act (8 & 9 Vict. c. 20), it is enacted (s. 77) in the case of the purchase of lands by any company constituted under that act, that the company shall not be entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them, except such part thereof as shall be necessary to be dug or carried away, or used in the construction of the works, unless the same shall have been expressly purchased, and that all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands, unless they shall have been expressly named therein and conveyed thereby. And by s. 78 it is enacted, that if the owner, lessee, or occupier of any mines or minerals lying under the railway, or any of the works connected therewith, or within the prescribed distance, or where no distance shall be prescribed, forty yards therefrom, be desirous of working the same, such owner, &c., shall give notice in

(*b*) *Caledon. Rail. Co. v. Sprot*, 2 Macq. 452. *Harris v. Ryding*, 5 M. & W. 60. *Haines v. Roberts*, 7 Ell. & Bl. 625; 6 ib. 643.

writing to the company of his intention; and if it appear to the company that the working of the mines is likely to damage the works of the railway, the company may, by giving compensation in the mode provided by the statute (c), prevent the working of the mines. But if, within thirty days after the receipt of the notice, the company do not state their willingness to treat for the payment of compensation, the owner of the mines may work them in a manner proper and necessary for the beneficial working thereof, and according to the usual manner of working mines in the district, making good damage done to the railway or works by improper working.

Similar provisions have been inserted in various acts of parliament incorporating canal companies, and enabling them to purchase lands for the formation of a canal, and the effect of them is to deprive the company of the right to support for the railway or canal from coal, ironstone, slate, or minerals beneath the surface of the adjoining land, or beneath the land over which the railway or canal is carried, unless they have purchased the slate or minerals, or compensation has been given in the manner prescribed by the statute (d).

Under statutory provisions of this sort, the company do not in the first instance pay to the landowner more than the value of the surface in the shape of purchase-money, or for the injury to the surface, if compensation only is made for damage; the minerals remain the property of the owner of the soil; but where he is desirous of getting them, the company have the option of purchasing at a fair price, to be settled, in case of dispute, in the usual way. These provisions, it has been observed, are for the benefit of the company, who are relieved from the great expense of buying the minerals along the whole line of an intended railway or canal in the first instance, before it is constructed; and are enabled to postpone the purchase of them until the time when, from the state of the market in the neighbourhood, the owners really want to get them. When this happens, the company have an option either to buy, in which case the landowner cannot get the minerals, but is fully-compensated for the loss of that right, or not to buy, in which case he receives no compensation at all, and his right to get them remains as complete as if no railway had been made (e).

In the case of canal companies, it has been held that clauses in acts of parliament requiring coal-owners to give notice to the company of their intention to work their mines within a certain distance of the canal, and giving liberty to the company to inspect the works, and to prohibit the

(c) Post, ch. 15.

(d) *Fletcher v. Gt. West. Rail. Co.*, 4 H. & N. 252; 28 Law, J., Exch. 150.

(e) *Dudley Canal Nav. Co. v. Grazebrook*, 1 B. & Ad. 72.

owners, upon compensation being made, from working within that distance, were framed for the purpose of enabling the company to purchase out the rights of the coal-owners, if they thought their canal works likely to be endangered by the nearer approach of the miners; that if the company declined the purchase, the coal-owners were left to their common law rights, as if no canal had been made, and they might take every part of their coal in the same manner as they might have done before the act passed; their former rights in that respect not having been taken away by the act, which has only appropriated the surface of the land, and so much of the soil as was necessary for the cutting and making of the canal, leaving the coal, &c. to the owners, to be enjoyed in the same manner as before (f).

Of the accessorial privilege and servitude of support from one house to another, where several houses have been built together so as to rest against each other.—Where a number of houses have been built together by one owner so as to require and receive mutual support, there is either, by a presumed grant, or a presumed reservation, a right to such mutual support for their common protection or security, so that if the houses are afterwards sold and conveyed to different individuals, this mutual dependence of one house upon another, and right to mutual support, continues; and if several adjoining landowners, by common consent and agreement, build their houses together, so that the house of one of them rests upon and requires the support of the adjoining house, there would be an implied grant of a right to mutual support; and this right would continue notwithstanding alterations in the ownership of the houses by sale, mortgage, devise, &c. (g). But if two houses are built against each other, with separate and independent walls, resting upon separate and independent foundations, so as to stand independently of each other, one house has no right to an easement of support from the other (h). But the easement of support may be gained, as we shall presently see, by twenty years' uninterrupted user and enjoyment of the privilege.

Of the accessorial servitude of support where the separate floors of a building are granted to several different proprietors.—If the owner of a house conveys the upper story to a purchaser, there is an implied grant of support from the lower stories, so that the owner thereof cannot interfere with the walls and beams upon which the upper story rests, so as to prevent them from affording proper support (i). And if a man builds a house, and forms each story or flat into a separate dwelling, and sells or lets the different

(f) *Wyrley Canal Co. v. Bradley*, 7 East, 371.

(g) *Richards v. Rose*, 9 Exch. 221.

(h) *Solomon v. Pintners' Co.*, Seventh

Week Rep. 613; 33 Law, T. R. Exch. 224.

(i) *Caledon. Rail. Co. v. Sprot*, 2 Macq. 450.

stories of the house to different individuals, there is an implied grant to every purchaser or hirer of the rooms of all such adjacent and subjacent support as may be necessary for the maintenance and enjoyment of each respective dwelling. And when the different floors and flats of the same house are held as separate freeholds by different individuals, the owner of the lower rooms and foundations is in general bound to uphold and maintain the main walls and necessary supports of the rooms above (*k*).

"Where I have a chamber below, and another has a chamber above mine, as they have here in London, in this case I may compel him who has the chamber above to cover his chamber for the salvation of the timber of my chamber below; and in the same manner he may compel me to sustain my chamber below by the reparation of the principal timber for the salvation of his chamber above" (*l*). There is a writ in *NATURA BREVium* to a mayor to command him that has the lower rooms to repair the foundation, and him that has a garret to repair the roof; and that is grounded upon a custom (*m*).

If the owner of a house grants the upper rooms to be holden and enjoyed for life or in fee, reserving to himself the lower rooms, he impliedly undertakes not to do anything which will derogate from his own grant (post, p. 38). If, therefore, he were to remove the supports of the upper room he would be liable to an action (*n*). And if he conveys the house to another by deed, reserving a lower story to himself, with powers of enlarging and altering such lower story, these powers must be exercised so as not to interfere with or endanger the necessary support to the rooms above, unless the right of support is expressly renounced by the grantee of the superior stories (*o*).

By the French law, "when the different stories of a house belong to different proprietors, and the titles to the property do not regulate the mode of reparations and reconstructions, they must be made in the following manner:—The main walls and the roof are at the charge of all the proprietors, each in proportion to the value of the story belonging to him. The proprietor of each story makes the floor belonging thereto; the proprietor of the first story erects the staircase which conducts to it; the proprietor of the second story carries the stairs from where the former ends to his apartments; and so of the rest" (*p*).

Abridgement of the right and servitude of support by express contract.—If the owner of land with subjacent mines grants away the mines, together with the power of raising the minerals, without regard to any injury done

(*k*) *Richards v. Rose*, 9 Exch. 221; 23 Law, J., Exch. 3. *Humphries v. Brogden*, 12 Q. B. 747.

(*l*) Anon. Keilw. 98, pl. 4. Anon. 11 Mod. 8.

(*m*) *Tenant v. Goldwin*, 6 Mod. 314; 2 Ld. Raym. 1093; Fitz. Nat. Brev. 127.

(*n*) Parke, B., 5 M. & W. 71.

(*o*) *Smart v. Morton*, 5 Ell. & Bl. 47.

(*p*) Cod. Civ. liv. 2, tit. 4, art. 664.

thereby to the surface, such a grant would, it seems, be good, and would bind the inheritance, and his estate in the surface would pass to his assigns, abridged to that extent of the right of support from the minerals. Hence it seems to follow, that it is competent for the owner of the surface of land effectually to curtail by grant, in favour of the owner of subjacent mines, the right to support therefrom (*q*).

When the privilege of free passage for light and air across adjoining land passes as accessory to the grant of a dwelling-house.—If the owner of a house and the surrounding land sells the house without the land, a free passage for so much light and air as may be reasonably necessary for the beneficial occupation and enjoyment of the house is impliedly granted by the vendor across his own adjoining unsold land, unless the privilege is excluded by the express terms of the conveyance. The vendor, therefore, cannot build on his own adjoining land so as to obstruct the access of light and air to the windows of the house. Having granted the house, he can do no act in derogation of his own grant. And if he sells and conveys the house to one man, and the adjoining land to another, the purchaser of the adjoining land cannot build so as to darken or obstruct the windows of the house, although such adjoining land may have been described as building-land, and the intention to build thereon may have been known to the purchaser at the time he purchased it (*r*).

Where the shell of an unfinished house was sold, with openings in the walls for the insertion of windows and doors, it was held that the vendor could not, after the sale and conveyance of the unfinished structure, build on his own adjoining land, so as to obstruct the access of light and air to the spaces left for windows, or place obstacles in the way of the exercise of a right of way to the apertures intended for doors. And when two separate purchasers buy two unfinished houses from the same vendor, and at the time of the purchase the spaces for windows and doors are marked out, this is a sufficient indication to the purchasers of the rights they are respectively to enjoy; so that they cannot subsequently interfere with each other's enjoyment of the windows and doors as marked out and impliedly agreed upon at the time of the sale (*s*). So if two lessees of houses and windows derive title from the same lessor, the one cannot, by buildings or erections, encroach upon the light and air of the other (*t*).

In these cases the right to the free passage of a reasonable quantity of light and air across the adjoining land becomes appurtenant to the house, and passes therewith to all successive owners of the property.

(*q*) *Rowbotham v. Wilson*, 8 Ell. & Bl. 128; 27 Law, J., Q. B. 64.

(*r*) *Palmer v. Fletcher*, 1 Lev. 122. *Swansborough v. Coventry*, 9 Bing. 305.

(*s*) *Compton v. Richards*, 1 Pr. 27. *Glave v. Harding*, 27 Law, J., Exch. 286.

(*t*) *Coutts v. Gorham*, 1 M. & M. 396.

Upon the same principle, it has been held that a landlord, after he has demised his house, cannot obstruct the lights existing at the time of the demise (*u*); nor can a lessee darken or obstruct windows of his own landlord which existed at the time of the demise, whether such windows were ancient or of recent construction (*x*). But the right of uninterrupted enjoyment is confined to the windows existing at the time of the conveyance, grant, or demise, and does not extend to windows subsequently opened, or to new windows varying in size, elevation; or position (*y*).

Of the rule or maxim of law that no man shall derogate from his own grant.—It is, as we have seen, a principle of law that no man shall derogate from his own grant (ante, pp. 36, 37); therefore, if a man has granted to another estovers, or a right to cut and carry away wood for burning, or a right to fish for his own use and consumption, if he destroys all the wood out of which the estovers were to be taken, or draws all the water away from the pond or stream and destroys the fish, the party grieved shall have his remedy by action; for these are wilful acts of the grantor, and it is a misfeazance in him to annul or avoid his own grant (*z*). If a man grants lands, reserving to himself the right to the coals and minerals beneath the surface, he cannot excavate them to the injury of the surface, and thereby derogate from his own grant. And if one man grants to another the privilege or easement of making and maintaining a covered sewer or watercourse, of certain specified dimensions, through the land of the grantor, for the purpose of carrying off waste and refuse water from the land of the grantee, the grantor has no right to use the sewer, and pour water into it, without the license and permission of the grantee (*a*). If a millowner sells a watermill which is supplied by water from an open sluice on the land of the vendor, the vendor cannot, after he has sold the mill, lawfully close the sluice, as he would, by so doing, derogate from his own grant. Both the vendor, and all persons claiming under him, are bound to keep the sluice open for the benefit of the grantee of the mill (*b*).

Of prescriptive incorporeal rights, prescriptive servitudes, and the Prescription Act.—The uninterrupted enjoyment for twenty years of an incorporeal right, from which juries were allowed, as we have seen, to presume an ancient grant (ante, pp. 28, 29) was not a bar or title in itself; for if the commencement of the enjoyment within what was called the period of legal memory (*i. e.* the period of the return of Richard Cœur de Lion from the Holy Land) could be shown, the presumption of an ancient grant in times

(*u*) *Cox v. Matthews*, 1 Ventr. 237, 239.
Rosewell v. Pryor, 6 Mod. 116.

(*x*) *Riviere v. Bower*, R. & M. 24.

(*y*) *Blanchard v. Bridges*, 4 Ad. & E. 180.

(*z*) *Twysden, J., Pomfret v. Ricraft*, 1

Saund. 322.

(*a*) *Lee v. Stevenson*, 27 Law, J., Q. B. 266.

(*b*) *Miner v. Gilmour*, 33 Law, T. R., H. L. 98.

long since passed away was rebutted, and the right defeated. To remedy this inconvenience, and shorten in effect the period of prescription, and make that period of enjoyment of an incorporeal right a bar or title of itself, which was so before only by the intervention of a jury, the statute 2 & 3 Wm. IV. c. 71, was passed.

This statute, commonly called "The Prescription Act," recites (s. 1) that the expression "time immemorial, or time whereof the memory of man runneth not to the contrary," was, by the law of England, in many cases considered to include and denote the whole period of time from the reign of King Richard I., whereby the title to matters that had been long enjoyed was sometimes defeated by showing the commencement of such enjoyment, which was productive of injustice; it is therefore enacted that no claim which may be lawfully made at the common law by custom, prescription, or grant to any RIGHT OF COMMON, or other PROFIT or BENEFIT, to be taken or enjoyed from or upon any land, except such matters and things as are therein specially provided for; and, except tithes, rent, and services, shall, where such right, profit, or benefit has been actually taken and enjoyed by any person claiming right thereto without interruption for the full period of THIRTY years, be defeated or destroyed by showing only that such right, profit, or benefit was first taken and enjoyed within the time of legal memory, but that such claim may be defeated in any other way by which the same was then liable to be defeated; and when such right, profit, or benefit has been so taken and enjoyed for the full period of SIXTY years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

By the same statute (s. 2), it is enacted that no claim which may be lawfully made at common law, by custom, prescription, or grant to any WAY OR OTHER EASEMENT, OR TO ANY WATERCOURSE, OR THE USE OF ANY WATER, to be enjoyed upon, over, or from any land or water, when such way or other matter shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of TWENTY years, shall be defeated or destroyed by showing only that such way, water, or other matter was first enjoyed at any time prior to such period of twenty years, but nevertheless such claim may be defeated in any other way by which the same was then liable to be defeated; and when such way or other matter shall have been so enjoyed, as aforesaid, for the full period of FORTY YEARS, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement by deed or writing.

Also (s. 3), that when the ACCESS AND USE OF LIGHT to and for any dwelling-house, workshop, or other building, shall have been actually

enjoyed therewith for the full period of *twenty* years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding (c), unless it shall appear that the same was enjoyed by some covenant or agreement expressly made or given for that purpose by *deed or writing*.

Each of the respective periods named in the act is to be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall be brought in question, and no act or other matter is to be deemed to be an interruption (s. 4), unless the same shall be submitted to or acquiesced in for one year after the party interrupted shall have had notice thereof, and of the person making or authorizing the same to be made.

And (s. 5) that in all actions upon the case and other pleadings, wherein the party might then by law allege his RIGHT generally, without averring the existence of such right from time immemorial, such general allegation shall be deemed sufficient; and if the same shall be denied, all and every the matters in the act mentioned and provided, which shall be applicable to the case, shall be admissible in evidence to sustain or rebut such allegation; and that in all pleadings wherein, before the passing of the act, it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof as of right, by the occupiers of the tenements, in respect whereof the same is claimed, for and during such of the periods mentioned in the act as may be applicable to the case, and without claiming in the name or right of the owner of the fee. In the several cases mentioned in and provided for by the act, no presumption is to be allowed or made (s. 6) in support of any claim, upon proof of the exercise or enjoyment of the right or matter claimed, for any less period of time or number of years than for such period or number mentioned in the act as may be applicable to the case and the nature of the claim.

The period during which a party capable of resisting the claim is an infant, idiot, *non compos mentis*, *feme couverte*, or tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted until abated by the death of any party thereto, is to be excluded (s. 7) in the computation of the periods mentioned, except only in cases where the claim is thereby declared to be absolute and indefeasible.

It is enacted also (s. 8), that when any land or water upon, over, or from which any right of way, or convenient watercourse, or use of water shall have been enjoyed or derived, hath been or shall be held under any term of life or any term of years exceeding three years from the granting

thereof, the time of the enjoyment of any such way, watercourse, or water, during the continuance of such term, shall be excluded in the computation of the said period of forty years, in case the claim shall, within three years next after the determination of such term, be resisted by the reversioner.

What sort of enjoyment is essential to the gaining of a prescriptive title to a profit à prendre, or an easement within the first and second sections of the Prescription Act.—In order to gain a prescriptive title from uninterrupted user and enjoyment of the profits, privileges, and easements mentioned in the first and second sections of the Prescription Act, it must be proved that the enjoyment has been “as of right,” for that is the form in which, by section 5 of the statute (ante, p. 40), the claim must be pleaded. It must be such an enjoyment as of right, and without interruption, as would under the old law of prescription have raised a presumption of a grant (d). “The whole purview of the Prescription Act,” observes Lord Abinger, “shows that it applies only to such rights as would before the act have been acquired by the presumption of a grant from long user. The act expressly requires enjoyment for different periods without interruption, and therefore necessarily imports such an user as could be interrupted by some one capable of resisting the claim. It also requires it to be of right” (e).

All circumstances, therefore, tending to rebut the presumption of a grant, and to prove that no grant could ever have existed, or have lawfully been made, are admissible in evidence to show that there was no enjoyment as of right within the meaning of the statute (f). Therefore, when lands are out on lease, an enjoyment by the acquiescence of the tenant, without the knowledge and acquiescence of the landlord or reversioner, cannot be made the foundation of a prescriptive right or title under the statute (ante, pp. 27, 28).

Enjoyment by consent or agreement.—The proviso in s. 1 of the Prescription Act, that the right shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement, expressly made or given for that purpose by deed or writing, supposes that there may be an enjoyment as of right, though by consent or agreement; but that applies to cases where the title to the dominant and servient tenements is such that the enjoyment could be as of right within the statute, not where from unity of possession or other-

(d) “Longus usus nec per vim, nec clam, nec precario.”—Bract, lib. 4, fol. 222; Co. Litt. 114. *Bright v. Walker*, 1 C. M. & R. 219.

(e) *Arkwright v. Gell*, 5 M. & W. 234.

Rigg v. Lonsdale, 1 H. & N. 923; 25 Law, J., Exch. 81.

(f) *Mill v. New Forest Com.* 18 C. B. 60; 25 Law, J., C. P. 215.

wise it necessarily cannot be. The enjoyment must be of right against the land, not against the individual (*g*).

User and enjoyment as of right against all persons having an estate or interest in the land.—A user and enjoyment which do not give a valid title as against the owner of the inheritance cannot give a title as against the lessee and the persons claiming under him, for no title at all can be gained by a user and enjoyment which do not give a valid title against all persons having estates in the land over or upon which the easement has been enjoyed (*h*).

What sort of enjoyment is essential to the gaining of a prescriptive right of way.—*Enjoyment of a way over land out on lease* does not give any right of way as against the reversioner. Thus, where a stranger entered on the land of the reversioner in the occupation of his lessee, and traversed the land with carts and horses in the exercise of an alleged right of way, it was contended that the trespass, being accompanied with a claim of right, would, if it continued unopposed by the reversioner, be evidence of a right of way as against him at some future period. "But acts of this sort," observes Holroyd, J., "cannot operate as evidence of right as against the reversioner of land demised to tenants, because the reversioner, during the demise, has no present remedy by which he could obtain redress for such an act. He could not maintain an action of trespass in his own name, because he was not in possession of the land, nor an action on the case for injury to the reversion, because in point of fact there was no such permanent injury as would be necessarily prejudicial to it; as, therefore, he had no remedy by law for the wrongful act done by the defendant, the act done by him, or any other stranger, would be no evidence of right as against the plaintiff, so long as the land was in possession of a lessee." In *Wood v. Veal* (*i*), it was held that there could not be a dedication of a way to the public by a tenant for ninety-nine years without consent of the owner of the fee, and that permission by such tenant would not bind the landlord after the term expired (*k*).

Enjoyment of a right of common by a tenant over land in the possession and occupation of his landlord.—Where a tenant enjoyed a right of common appurtenant to a tenement rented by him over land which was possessed and occupied by his landlord as tenant for life, it was held that, as the landlord could not have an enjoyment as of right against himself, so neither could his tenant. All the tenant's rights were derived from his

(*g*) *Warburton v. Parke*, 2 H. & N. 64.;
26 Law, J., Exch. 299.

(*h*) *Bright v. Walker*, 1 C. M. & R. 220.
Winship v. Hudspeth, 10 Exch. 7; 23

Law, J., Exch. 208.

(*i*) 5 B. & Ald. 454.

(*k*) *Baxter v. Taylor*, 4 B. & Ad. 75.

landlord, and whatever he enjoyed was enjoyed by grant from the latter, and such an enjoyment is not an enjoyment of right within the statute (l).

What sort of enjoyment is essential to the gaining of a prescriptive right to the use of any watercourse or water—Natural and artificial watercourses.—All persons having lands on the margin of a flowing stream have by nature, as we have seen (ante, p. 1), certain rights to use the water of that stream, whether they exercise those rights or not; and they may begin to exercise them whenever they will. By usage, they may acquire a right to use the water in a manner not justified by their natural rights; but such acquired right has no operation against the natural rights of a landowner higher up the stream, unless the user by which it was acquired affects the use that he himself has made of the stream, or his power to use it, so as to raise the presumption of a grant, and so render the tenement above a servient tenement (m).

When a mill has been erected upon a stream, and has stood there, and been worked for the period of twenty years, it gives to the millowner a right that the water shall continue to flow to and from the mill in the manner in which it has been accustomed to flow during all that time. The owner is not bound to use the water in the same precise manner, or to apply it to the same mill; if he were, that would stop all improvements in machinery. If, indeed, alterations made prejudice the right of a lower mill, the case would be different (n).

Prescriptive right to pen back water.—If the water of a natural stream is conducted to the plaintiff's land by an artificial cut or channel made through the land of the defendant, and the plaintiff and the former occupiers of the plaintiff's land have for more than twenty years enjoyed this flow of water, and have from time to time during the period gone upon the defendant's land, and repaired the banks of the artificial cut, and cleaned it out, and placed stones and stakes, and maintained a dam in the natural stream for the purpose of penning back the water, and making it flow through the artificial watercourse, a prescriptive right to the flow of water and to the exercise of these customary acts will be gained (o).

Prescriptive rights to foul the pure water of a stream, and convert a natural watercourse into a sewer, may be gained by twenty years' uninterrupted user and enjoyment of the privilege. "The general rule of law," observes Lord Ellenborough, "as applied to this subject, is, that if a stream be corrupted in quality, as by means of the exercise of certain

(l) *Warburton v. Parke*, 2 H. & N. 64; 26 Law, J., Exch. 298.

(m) *Sampson v. Hoddinott*, 1 C. B., N. S. 611; 26 Law, J., Exch. 148.

(n) *Saunders v. Newman*, 1 B. & Ald. 261.

(o) *Beeston v. Weate*, 5 Ell. & Bl. 986; 25 Law, J., Q. B. 115.

noisome trades, yet if the occupation of the stream by the party so taking or using it has existed for so long time as may raise the presumption of a grant, the other party, whose land is below, must take the stream subject to such adverse right. I take it that twenty years' exclusive enjoyment of the water in any particular manner affords a conclusive presumption of right in the party so enjoying it, derived from grant or act of parliament" (p).

User and enjoyment of water from artificial drainage.—The circumstances under which a watercourse was originally made, and under which it has been subsequently enjoyed, may prove the enjoyment, however long continued, to have been without right, or any pretence or claim of right. The artificial nature of an adit or watercourse, constructed for the purpose of draining a mine, and a notorious practice in mineral districts for the owners of mines to make watercourses for the purpose of draining their mines, and resume and discontinue the working of their mines at their own convenience, and according as it suits their interests, may fix all persons with the knowledge that those who cleared the mine by the adit notoriously reserved to themselves the right of working the mine at any time, with all the rights of fouling the water flowing from the mine with the dirt and rubbish which usually attend mining operations, so as to prevent parties who have taken advantage of the accidental non-user of the mine to use the adit-water from having an enjoyment as of right, and gaining a title to the use of the water uncontaminated by mining operations (q).

"The proposition that a watercourse, of whatever antiquity, and in whatever degree enjoyed by numerous persons, cannot be enjoyed so as to confer a right to the use of the water, if proved to have been artificial, is quite indefensible; but, on the other hand, the general proposition that, under all circumstances, the right to watercourses arising from enjoyment is the same, whether they be natural or artificial, cannot possibly be sustained. The right to artificial watercourses, as against the party creating them, depends upon the character of the watercourse, whether it be of a permanent or temporary nature, and upon the circumstances under which it is created. The flow of water for twenty years from the eaves of a house could not give a right to the neighbour to insist that the house should not be pulled down, or altered so as to diminish the quantity of water flowing from the roof. The flow of water from a drain, for the purposes of agricultural improvements, for twenty years, could not give a right to the neighbour so as to preclude the proprietor from

(p) *Bealey v. Shaw*, 6 East, 214.
Wright v. Williams, 1 M. & W. 77.
Carlyon v. Lovering, 1 H. & N. 789.

(q) *Magor v. Chadwick*, 11 Ad. & E. 585.

altering the level of his drains for the greater improvement of the land. The state of circumstances in such cases shows that one party never intended to give, nor the other to enjoy, the use of the stream as a matter of right" (r).

If a steam-engine or sough is constructed and used by the owner of a mine to drain it, and the water pumped up by the engine, or collected by the sough, flows in a channel to the estate of the adjoining landowner, and is there used for agricultural purposes for twenty years, no right to the water in perpetuity can be gained from any such user, so as to burthen the owner of the mine and his assigns with the obligation of keeping up the steam-engine or the sough, and pumping or collecting water for the benefit of the adjoining landowners. In cases of this sort no right is acquired as against the owner of the property from which the course of water takes its origin, though as between the first and any subsequent appropriator of the watercourse itself such a right may be acquired (s). If a farmer, by some system of drainage, draws off the rain-fall from his lands, and pours it into the plaintiff's ditch, and so creates a new and artificial supply of water, and the latter uses the water for more than twenty years, and after that the farmer adopts a new mode of drainage, and in so doing cuts off the artificial supply of water, the plaintiff has no remedy for the loss of the water, the supply being of a temporary character, and the circumstances showing that the one party never intended to give, nor the other to enjoy, the use of the artificial drainage-water as a matter of right (t).

What sort of enjoyment is essential to the gaining of a right of support to buildings from the adjoining land or buildings of a neighbouring proprietor.—

When houses and buildings have been notoriously supported by the adjoining land or buildings of a neighbouring proprietor for the full period of twenty years, a prescriptive right to the support is gained, unless something be shown to displace such right (u). A defendant who has acquiesced for more than twenty years in the enjoyment, by the plaintiff, of the privilege of lateral support from the defendant's adjoining soil or building, cannot afterwards lawfully interrupt the enjoyment of such privilege (x); but the adjoining proprietor must have known, or had the means of knowing, that the one house was supported by the other, and have acquiesced in the enjoyment of the privilege by his neighbour (y).

(r) Per Cur. *Wood v. Waud*, 3 Exch. 779.

(s) *Arkwright v. Gell*, 5 M. & W. 232.

(t) *Greutrex v. Hayward*, 8 Exch. 291.
Rawstron v. Taylor, 11 ib. 309.

(u) *Parke, B., Hide v. Thornborough*, 2 C. & K. 255.

(x) *Brown v. Windsor*, 1 Cr. & Jerv. 27.
Rogers v. Taylor, 2 H. & N. 828; 27 Law, J., Exch. 175.

(y) *Solomon v. Fintners' Co.*, 7 Week Rep. Exch. 613; 33 Law, T. R. 224.

"There may be some difficulty," observes Lord Campbell, "whence the grant of the easement of support to a house is to be presumed, as the owner of the adjoining land cannot prevent its being built, and may not be able to disturb the enjoyment of it, without serious loss or inconvenience to himself; but the law favours the preservation of enjoyments acquired by the labour of one man, and acquiesced in by another who has the power to interrupt them; and, as on the supposition of a grant, the right to light may be gained from not erecting a wall to obstruct it, the right to support for a new building erected near the extremity of the owner's land may be explained on the same principle (z); but a grant ought not to be inferred from any lapse of time short of twenty years after the neighbour was, or ought to have been, fully aware of the facts. The easement must have been enjoyed for twenty years under a claim of right, "and if neither party was acquainted with the fact that the easement was actually used at all, we should probably," observes Alderson, B., "be of opinion that there was no user of the easement under a claim of right" (a). We have seen that if two houses are built against each other, with separate and independent walls, resting upon separate and independent foundations, so as to stand independently of each other, one house has no right to support from the other; and if the foundations of one of the houses subside, and the house rests upon the adjoining house, and requires the support of the latter, it does not follow that, because it has required and received that support for twenty years, any right to support is thereby acquired (ante, p. 45).

What sort of enjoyment of the benefit of a boundary fence is requisite to gain a prescriptive right to have the fence kept up at the expense of one landowner, for the benefit of another.—We have seen that the presumption of legal title by grant to easements and incorporeal rights in the lands of others is founded on adverse enjoyment of such rights from time immemorial. But where the enjoyment can be satisfactorily accounted for, and is consistent with there having been no grant, there is, as we have seen, no ground for presuming one (ante, p. 27).

In the case, therefore, of proof of enjoyment by one landowner of a fence erected by his neighbour, and repaired, as occasion required, by the latter, there is no proof of such adverse enjoyment as raises a presumption of a grant of the benefit of the fence by one landowner to the other. Every man is bound by law to take care that his beasts do not trespass upon the lands of his neighbours. He may prevent their doing so, either by employing servants to keep them within the limits of his own land, or by inclosing his land with fences, so that the cattle cannot escape. The making of a fence, therefore, between his own land and that of his neigh-

(z) *Humphries v. Brogden*, 12 Q. B. 749.

(a) *Partridge v. Scott*, 3 M. & W. 230.

bour, does not raise any inference that the fence was intended for the benefit of his neighbour, although the fence prevents his neighbour's beasts from trespassing as well as his own; for it is for his own benefit to prevent his beasts from trespassing upon his neighbour's property (b).

What sort of enjoyment is essential to the gaining of a prescriptive right to the access of light to windows.—The third section of the Prescription Act provides, as we have seen, that where the access and use of light to and for any dwelling-house, workshop, or other building, shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local custom or usage to the contrary notwithstanding; unless it shall appear that the same was enjoyed by some consent or agreement, expressly made or given for that purpose, by deed or writing. "This section," observes Parke, B., "is differently worded from the others, and the acquisition of right to light is much favoured, as a far less time gives an indefeasible right; and the proviso in the 7th section (ante, p. 40), which excludes the time when a person, otherwise capable of objecting, is an infant, idiot, *non compos*, *feme covert*, or tenant for life, from other periods of computation, includes it in this. It also differs from the 2nd section, in not requiring that the enjoyment should be by a person 'claiming right' in express terms. What, then, is the enjoyment contemplated by the 3rd section? We think it clear, notwithstanding the absence of the words in the 2nd section above referred to, that it converts into a right such an enjoyment only of the access of light over contiguous land as had been had for the whole period of twenty years, in the character of an easement, distinct from the enjoyment of the land itself, and that the statute puts this species of negative easement, as it has been termed, on the same footing, in this respect, as those positive easements provided for by the other sections, all of which, after long enjoyment as easements, are invested with the quality of rights. In the first place, the access of light under this section must have been enjoyed for twenty years without interruption—not in the sense of an uninterrupted or continuous user—but without such interruption as is mentioned in the subsequent section—that is, an interruption submitted to for one year after the party shall have had notice thereof, and of the persons making or authorizing the same to be made (c). From this it follows, that the legislature contemplated such an enjoyment as could be interrupted by the adjoining occupier, at least during some part of the time" (d).

If windows have been enjoyed, subject to the payment of a rent, this is an enjoyment by consent or agreement, and therefore confers no right

(b) *Boyle v. Tamlyn*, 6 B. & C. 387.

(d) Parke, B., *Harbidge v. Warwick*, 3

(c) *Flight v. Thomas*, 8 Cl. & Fin. 231.

Exch. 556; 18 Law, J., Exch. 245.

under the statute; but the payment of the rent is no evidence of any interruption of enjoyment (e).

Unity of ownership of the dominant and servient tenements preventing the acquisition of a prescriptive right to the free access of light and air.—If the house and windows and the adjoining premises over which the light and air come are in the possession of the same person, no grant can be presumed from the enjoyment of the light in that condition of the property, and no right to the light can be acquired under the statute by reason of such enjoyment. Thus, where the plaintiff and his father, whom he succeeded, had occupied a house, of which they were successively seized in fee for more than sixty years, and had also, during the whole period of their occupation of the house, occupied an adjoining garden as tenants from year to year under three successive landlords, of which the defendant was the last, and the light and air came to the windows of the house across this garden, and the defendant, having determined the yearly tenancy, and got possession of the garden, set to work to raise the garden-wall, and in doing so obstructed the windows of the plaintiff's house, it was held that the enjoyment of the light and air across the garden, during the unity of possession of the house and garden, was not such an enjoyment of light and air as could be made the foundation of a prescriptive right under the statute, and that the plaintiff consequently could not maintain any action for the obstruction of his windows (f). Where, on the other hand, the windows and the land across which the light comes are in the occupation of different parties, and there is no unity of possession of the dominant and servient tenements, a prescriptive right would be gained by twenty years' uninterrupted enjoyment, although the servient land across which the light comes is held on lease, unless it can be shown that the landlord or reversioner had objected to the windows, or was wholly ignorant of their existence (g).

Enlargement of windows.—Enjoyment of enlarged windows.—A party cannot, by enlarging a window, enlarge his right to the enjoyment of light and air. The enlarged portion of an ancient window constitutes a new window, and does not enjoy the same rights and privileges as the ancient aperture. If an ancient window is supplanted by a new window, varying in size, elevation, or position from the ancient window, the new window may be obstructed by the adjoining landowner, but not the space occupied by the ancient aperture (h).

What interruption in the enjoyment prevents the acquisition of a title by

(e) *Plasterers' Co. v. Parish Clerks' Co.*, 6 Exch. 630.

(f) *Harbidge v. Warwick*, ante, p. 47.

(g) *Cross v. Lewis*, 2 B. & C. 686;

ante, p. 47.

(h) *Blanchard v. Bridges*, 4 Ad. & E. 191.

Chandler v. Thompson, 3 Campb. 80.

Martin v. Goble, 1 ib. 323.

prescription.—By s. 4 of the Prescription Act, it is enacted, that no act or other matter shall be deemed to be an interruption, unless the same shall have been submitted to or acquiesced in, for one year after the party interrupted shall have had notice thereof, and of the person making the same, or authorizing the same to be made. Where, therefore, the use of light and air had been enjoyed for nineteen years and three hundred and thirty days; and was then interrupted by the erection of a building, which interruption continued to the time of the commencement of the action, but the interruption was not submitted to or acquiesced in, as the plaintiff brought his action within a few months thereof, it was held that such erection of a wall was not an interruption preventing the establishment of the right within the terms of the fourth section of the statute (i). But though an interruption must be acquiesced in for a full year before it breaks the period, where the subject-matter has, previously to the interruption, been enjoyed as of right, interruptions acquiesced in for less than a year may be of great weight as evidence on the question whether there ever was a commencement of an enjoyment as of right. Such interruptions are explanatory of the real nature of the user. If the enjoyment has been contentious, it is not of right. Where a party had been summoned, and convicted and fined for drawing off water from a watercourse, it was held that the conviction and fine, and payment of the fine, were proper and most material evidence of the user and enjoyment not having been of right (k).

Of the necessity of a continuous enjoyment as of right and without interruption.—The enjoyment of the profit à prendre, or easement, must be an enjoyment for a continuous period, without such interruption as is defined in the fourth section of the statute. "To hold," observes Parke, B., "that the words of the statute might be satisfied by an enjoyment for different intervals, which added together would be twenty years, the last continuing up to the commencement of the suit, would be to let in a great number of cases in which the presumption of a grant never could have existed before the statute (l). Some act of user must take place within each year; for one of the clauses in the statute says, that no act or other matter shall be deemed an interruption, unless submitted to or acquiesced in for one year (ante, p. 40), which evidently points to that description of right which is exercised at least once a-year, and which, if interrupted for a year, is defeated" (m).

But where proof was given of the enjoyment of a profit à prendre at the time of the commencement of an action, and for thirty years before,

(i) *Flight v. Thomas*, 11 Ad. & E. 699;
8 Cl. & Fin. 241.

(l) *Onley v. Gardiner*, 4 M. & W. 500.

(k) *Eaton v. Swansea Water Co.*, 17 Q. B. 267.

(m) *Lowe v. Carpenter*, 6 Exch. 881.

but enjoyment during the whole of the intermediate period could not be proved, it was held to be a question for a jury, whether at that time the right had ceased, or was still substantially enjoyed. Thus, where there was an actual enjoyment of common of pasture for forty years next before the commencement of an action, with the exception of an interval of two years out of the forty, when the claimant ceased to use the common, because he had no commonable cattle to depasture, and not in consequence of any obstruction to his exercise of the right, it was held that the jury were justified in finding a continued enjoyment of the right during the two years in which it was not exercised (*n*). Where, on the other hand, an artificial impediment in the shape of a stang or rail had been erected, which prevented the access of cattle from the plaintiff's farm to the land over which the right of common was claimed, and this stang was removed by agreement, and then the plaintiff's cattle depastured on the land, and continued so to do for twenty-eight years continuously after the removal of the stang, down to the time of the commencement of the action, it was held that an enjoyment for thirty years could not be presumed from this evidence (*o*).

What breaks the continuity of the enjoyment—Asking leave.—"The asking leave from time to time breaks the continuity of the enjoyment as of right; because each asking of leave is an admission that, at that time, the asker had no right; and, therefore, the evidence of such asking within the period is admissible under a general traverse of the enjoyment for forty or twenty years as of right" (*p*).

Of the necessity of a continuous enjoyment down to the period of the commencement of the action.—The Prescription Act expressly requires (ss. 1, 2) enjoyment "without interruption for the full periods therein mentioned." S. 6 enacts, that no presumption shall be allowed in support of any claim on proof of enjoyment for any less period or number of years; and by s. 4 it is enacted, that each of the respective periods of years thereinbefore mentioned shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been, or shall be, brought in question. It has accordingly been held that the enjoyment, in order to give a right under the statute, must be up to the time of the commencement of the suit, not up to the time of the act complained of; and, consequently, that an enjoyment for twenty years or more before that act gives only what may be termed an inchoate title, which may become complete or not by an enjoyment subsequent, according as that enjoyment is or is not continued to the commencement

(*n*) *Carr v. Forster*, 3 Q. B. 581; post, p. 56.

(*o*) *Bailey v. Appleyard*, 8 Ad. & E. 165.

(*p*) *Tickle v. Brown*, 4 Ad. & E. 382.
Bright v. Walker, 1 Cr. M. & R. 219.

of the suit" (q). But when a prescriptive right has once been gained by twenty or thirty years' uninterrupted enjoyment as of right, it is not lost again by non-user for one or more years, if the non-user is accounted for and explained by circumstances showing that the right was not abandoned, though it was not exercised, either because there was no occasion for its exercise (r), or because of some temporary substitute having been provided, or of some temporary arrangement or understanding having been made between the owners of the dominant and servient tenements, keeping the right in suspension or abeyance, but not extinguishing it.

An exercise of the right once a-year down to the time of the commencement of the action is not, therefore, in all cases, essential to the proof of a prescriptive title. Thus, where there had been an immemorial enjoyment of a right of way by the defendant across the plaintiff's close, and the defendant ceased to exercise his right, and to use and enjoy the way for a great number of years, because he had obtained leave to use a more convenient way, it was held that the non-user, under such circumstances, of the ancient way did not deprive him of his prescriptive right, and that he was entitled to resort to the old way, although he had not used it for several years next before an action against him was commenced (s). When a new track has been substituted for the ancient path by parol agreement for an indefinite time, "the user of the substituted way," observes Patteson, J., "may be considered as substantially an exercise of the old right, and evidence of the continued enjoyment of it" (t). It has been said that, as a prescriptive right of way or of common can only be acquired by twenty or thirty years' enjoyment, it ought not to be lost without disuse for the same period; but it has been held that the period of disuse is only one element from which the grantee's intention to retain or abandon his easement is to be inferred, and that no particular period of disuse can be relied upon as proof of an extinguishment of the easement (u).

Exclusion from the computation of the thirty and twenty years' enjoyment of those periods during which parties otherwise capable of resisting the claim were infants, idiots, feme covertes, or tenants for life.—The seventh section of the Prescription Act provides, as we have seen, that the time during which any person otherwise capable of resisting the claim shall be an infant, *non compos mentis*, *feme coverte*, or tenant for life, shall be excluded from the computation of the respective periods, except where the

(q) *Ward v. Robins*, 15 M. & W. 242.
Baltishill v. Reed, 18 C. B. 705; 25 L.W.
 J., C. P. 290. *Parker v. Mitchell*, 11 Ad.
 & E. 788.

(r) *Carr v. Forster*, 3 Q. B. 581.

(s) *Ward v. Ward*, 7 Exch. 888; 21

Law, J., Exch. 334. *Carr v. Forster*, 3
 Q. B. 581.

(t) Patteson, J., *Payne v. Shedden*, 1
 Mood & Rob. 383. *Littledale, J., Moore*
v. Rawson, 3 B. & C. 839; post, p. 56.

(u) Post, pp. 58-59.

claim is thereby declared to be absolute and indefeasible. The claim is by the statute declared to be absolute and indefeasible in those cases where there has been an enjoyment as of right and without such interruption as is mentioned in s. 4 of a way, watercourse, or use of water, or other easement for the term of forty years, and of a profit à prendre for the term of sixty years, and of the access and use of light and air to any dwelling-house, workshop, or other building for twenty years, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing.

Where a defendant claiming a prescriptive right to the enjoyment of a profit à prendre in the soil of the plaintiff showed an uninterrupted enjoyment for twenty years before a life estate, and during its continuance, and for six years after its determination up to the commencement of the action, and the question was whether that enjoyment was sufficient, or whether the thirty years must be the actual thirty next before the commencement of the action, it was held that the two sections of the statute, viz. s. 4, enacting that the respective periods of enjoyment should be deemed and taken to be the period next before some suit or action, and s. 7, providing that the time during which any person capable of resisting the claim was tenant for life, &c., were to be excluded in the computation, must be read together, so that the period is thirty years next before the action, excluding in the computation of those thirty years any tenancy for life (x).

Of the right of reversioners to exclude from the computation of the forty years the periods of the enjoyment of a way or watercourse, and use of water over lands demised for life or years.—By s. 8 of the Prescription Act (ante, p. 40), it is expressly enacted, that when any land or water upon, over, or from which any right of way or convenient watercourse, or use of water, shall have been enjoyed or derived, hath been or shall be held under any term of life, or any term of years exceeding three years from the granting thereof, the time of the enjoyment of any such way, watercourse, or water, during the continuance of such term, shall be excluded in the computation of the said period of forty years, in case the claim shall within three years next after the determination of such term be resisted by the reversioner.

By the ancient law of prescription, whenever it appeared that the land over or upon which an easement of this sort had been enjoyed was in the occupation of a tenant for life, or tenant for term of years during the whole period of the enjoyment of the privilege, the presumption of a grant was rebutted and the easement extinguished, however long and

(x) *Clayton v. Corby*, 2 Q. B. 824.

notorious might have been the user and enjoyment, and although the owner of the fee was fully aware of all that had been done upon the land (*y*), and had made no protest against, or objection to, the enjoyment of the privilege. But, since the Prescription Act, if the privilege has been enjoyed without such interruption for forty years, the right cannot be defeated merely by showing that the land was on lease during the whole period of enjoyment; but the reversioner may, within three years after the determination of the particular estate, resist the claim to the easement, and exclude the forty years' enjoyment; but, in order to do this, he must allege in his pleading, and prove at the trial, that he is the person entitled to the reversion expectant on the determination of the particular estate, and that he has resisted the claim within three years of the determination thereof (*z*).

"The period during which the land over which the right is claimed has been leased for a term exceeding three years is not, under s. 8, to be excluded from the computation of a twenty years' enjoyment. Sect. 7 excludes certain times, including that of a tenancy for life, but not that of a tenancy for years, from the computation of the 'periods' thereinbefore mentioned; and a twenty years' enjoyment is one of those periods. But s. 8 provides for the exclusion of certain other times, among which is a tenancy for more than three years, not from the periods thereinbefore mentioned, but from one particular period only, expressly mentioned, namely, that of an enjoyment for forty years" (*a*).

Waiver and extinguishment of easements — Parol abandonment of incorporeal rights.—Where an easement is granted for a particular purpose, or arises as accessorial to a thing granted (*ante*, p. 30), and the purpose can no longer be accomplished, or the thing granted ceases to exist, so that the easement can no longer be applied to the object for which it was originally granted, the easement is at an end (*b*). A mere parol license or agreement will suffice for the destruction, although it is insufficient (*ante*, p. 23) for the creation of an easement. Thus, if a person possessed of an easement over the land of the adjoining landowner verbally authorizes the latter to do an act of notoriety upon his own land which, when done, will be inconsistent with the continued enjoyment of the easement, and the license or authority is acted upon, and the thing done, the authority so given and acted upon cannot be revoked, and the easement consequently is extinguished. Where the plaintiff, for example, having a right to the uninterrupted access of light and air across the defendant's area, had given

(*y*) *Bradbury v. Grinsell*, 3 Saund. 175, i in notis. *Barker v. Richardson*, 4 B. & Ald. 581. *Wood v. Veal*, 5 ib. 456.

(*z*) *Wright v. Williams*, 1 M. & W. 100.

(*a*) *Ld. Campbell, Palk v. Skinner*, 18 Q. B. 574; 22 Law, J., Q. B. 27.

(*b*) *National Guaranteed Manure Co. v. Donald*, 4 H. & N. 8; 28 Law, J., Exch. 185.

the defendant a parol license or permission to put a skylight over his area, and the skylight was erected by the defendant on his own land, and, when built, was found to impede the passage of the air and light, and to obstruct the plaintiff's easement, it was held that, as the parol license or permission had been acted upon and executed, and the skylight built, the license was irrevocable, and the easement was extinguished (c).

So where the plaintiff, having a right to the use of a stream of water which flowed through the land of the defendant, gave the defendant a parol license or permission to lower the banks of the river, and erect a weir, and divert a portion of the water which had previously flowed to the plaintiff's mill, it was held that the plaintiff, after he had so given up his right to the water that had been diverted, and suffered the defendant to act upon the faith of such relinquishment, and incur expense in doing on his own land the very thing that was authorized by the plaintiff to be done, could not then lawfully retract such consent, and throw on the defendant the burthen of restoring things to their former condition (d).

The same rule prevails in the civil law. In the "Digest," for example, it is laid down that "if I have a right of discharging my eaves'-droppings into your area, and I authorize you to build in this area, I lose my right of discharge; and so, if I have a right of way over your property, and I authorize you to do anything in the place over which my right of way exists, I lose my right of way" (e).

Waiver and extinguishment of an easement of light and air.—If a party entitled to an easement of light and air does any act of notoriety showing that he abandons the benefit of the light and air he enjoyed, he may lose his right in a much less period of time than would suffice to enable him to gain it. Where the owner of a building with ancient windows overlooking the defendant's premises pulled down the building, and erected another with a blank wall without any windows, and fifteen years afterwards the defendant erected a building next this blank wall, and the plaintiff then opened windows in the blank wall in the place where his ancient windows formerly stood, and then brought an action against the defendant for the obstruction to the light and air caused by the defendant's new building, it was held that the windows thus opened could not claim the privileges of the ancient windows which had formerly existed on the same spot; that those privileges had been lost by manifest disuse, and that the action was not maintainable (f).

(c) *Winter v. Brockwell*, 8 East, 309.

(d) *Liggins v. Inge*, 5 M. & P. 712. 7 Bing. 682.

(e) "Si stillicidii immittendi jus habeam in aream tuam, et permisero jus tibi in ea areâ ædificandi, stillicidii immittendi

jus amitto. Et similiter si per tuum fundum via mihi debeat, et permisero tibi, in eo loco, per quem via mihi debetur, aliquid facere, amitto jus viæ."

—Dig. lib. 9, tit. 8, l. 8.

(f) *Moore v. Rawson*, 3 B. & C. 332.

If a window has been bricked up for twenty years, it is, when re-opened, to all intents and purposes, a new window (*g*). But if the facts show that the windows were only temporarily disused, that the frames and sashes were kept in, or the spaces filled, with a temporary hoarding, which could readily be removed, the owner of the window-spaces will not have lost his right to the easement of light and air by the disuse of the windows for any period short of twenty years; but if the window-spaces are obliterated and bricked up, and the adjoining landowner is permitted to build against them, and to incur expense in the reasonable belief that the windows had been permanently abandoned, the owner of the windows cannot then insist upon his ancient right, and claim damages for an injury which has been brought about by his own negligence and want of care (*h*).

If a tenant stops up any of the windows of a house that has been demised to him, he is responsible in damages to his landlord (*i*).

Extinguishment of an easement of light and air by alterations in windows and buildings.—A party may so alter ancient windows and apertures through which light and air have been admitted into the interior of a building as to lose his right altogether. He may so change the course and direction of the light, and so alter the position of his windows, as to entitle the owner of the adjoining land to block them up altogether (*k*). If windows have been opened with blinds attached to them sloping upwards, so as to admit the light but obstruct the view, the right to light and air which these windows may have acquired by user cannot be enlarged by removal of the blinds. If the blinds are removed, the view from the windows may be obstructed, provided the obstruction causes no greater impediment to the light and air than was caused by the old blinds (*l*).

If, by the alterations which the plaintiff has made, he has exceeded the limits of his ancient right to light and air, and has put himself into such a position that the excess of light and air gained by him cannot be obstructed by the defendant, in the exercise of his lawful rights on his own land, without at the same time obstructing the ancient right of the plaintiff, the latter will lose his ancient right altogether; at all events, until he has restored his windows to their former state. Thus, where the plaintiff and defendant had houses on opposite sides of a narrow court, and the plaintiff rebuilt his house on the old foundations, but raised it a story higher, putting therein new windows, and altering the dimensions of all the windows in the lower stories, and the defendant then raised his house to the same elevation as the plaintiff's, and thereby darkened and obstructed both the new windows in the plaintiff's new story, and all the

(*g*) *Lawrence v. Obce*, 3 Campb. 514.

(*h*) *Stokoe v. Singers*, 8 Ell. & Bl. 39;
26 Law, J., Q. B. 257.

(*i*) *Thomlinson v. Brown, Sayer*, 215.

(*k*) *Garritt v. Sharp*, 3 Ad. & E. 330.

(*l*) *Cotterell v. Griffiths*, 4 Esp. 69.

windows in his lower story, it was held that, as the primary cause of the plaintiff's misfortune was his own act, in raising his own house and opening new windows, he had no ground to complain. "We by no means say," observes the Court, "that where the owner of a house alters the dimensions of an ancient window in it, he may in no case maintain an action for that which is an obstruction to the window in its new state, and would have been an obstruction to it in its former state. If the wall in which the window is be on the extremity of the owner's land, and the window is enlarged at the lower part of it, the owner of the adjoining land could obstruct the unprivileged part of the window, but would not be justified in building a wall which would obstruct the whole window. But in this case there was no mode of obstructing the new and unprivileged windows and portions of windows without obstructing the whole of them" (*m*).

Disuse of right of way.—The presumption of abandonment of a right of way does not arise from the mere fact of non-user, when nothing has been done adverse to the user, and no obstruction has been offered to the enjoyment of the right. Thus, where an immemorial right of way had been enjoyed by the defendant from the defendant's close across the adjoining land of the plaintiff to the high road, and the defendant had demised his close to the plaintiff, and after that to several other tenants, who obtained by leave and license of the plaintiff and others a more easy and convenient access to and from the property, and the old prescriptive way was consequently disused for a great many years, it was held that the prescriptive right was not extinguished by the non-user (*n*). The use of the new track may, as we have seen, be considered as an exercise of the old right (*o*). When, therefore, a new way has been substituted by agreement of the parties in lieu of an old prescriptive way, and the new way is stopped, the old prescriptive right of passage revives (*p*).

If the jury find the right of way once well commenced, it must be shown that it has subsequently been released, abandoned, or destroyed. An express release of the easement would of course destroy it at any moment, so the cesser of use, coupled with any act clearly indicative of an intention to abandon the right, would have the same effect without any reference to time. It is not so much the duration of the cesser of enjoyment as the nature of the act done by the grantee of the easement, or of the adverse act acquiesced in by him and the intention in him which either the one or the other indicates. The period of time is only material as one element from which the grantee's intention to retain or abandon his ease-

(*m*) *Renshaw v. Bean*, 18 Q. B. 132;
21 Law, J. ib. 219.

(*n*) *Ward v. Ward*, 7 Exch. 838.

(*o*) *Payne v. Shedden*, ante, p. 51.

(*p*) *Lovell v. Smith*, 3 C. B., N. S. 120.

ment may be inferred against him; and what period may be sufficient in any particular case must depend on all the accompanying circumstances (q).

A private right of way is not extinguished by the subsequent dedication of the way to the publick (r).

Extinguishment of ways of necessity.—A way by necessity is commensurate only with the existence of such necessity, so that when the necessity ceases the right of way also ceases. Where, therefore, a party who has a way of necessity over the lands of another is able to approach the land for which the way was used by passing over his own soil, the right of way is extinguished. "When, by a subsequent purchase, he is enabled to reach his house, farm, or field without touching the land of his neighbour, the necessity of going upon the land of the latter ceases, and, the necessity ceasing, the right founded upon such necessity ceases also" (s).

Suspension and forfeiture of rights of way and watercourse by the non-performance of conditions annexed to the grant.—If a right of way is granted to another, he contributing and paying his rateable share and proportion of the expense of repairing the way, and repairs become necessary, and the way is repaired by the grantor, and the grantee refuses to pay his rateable proportion of the expense, his right of way will become forfeited, or will be suspended until the accomplishment of the condition annexed to the grant; but the grantee has the right to use the way without paying anything until repairs become necessary, and the cost of them has been ascertained, and the grantee has refused to pay his share of the cost (t). If a right of watercourse is granted with certain limitations and restrictions, and the grantee exceeds his limited right, and refuses to conform to the restrictive conditions, he loses his right altogether, until he makes his enjoyment of it conformable to the conditions of the grant (u).

Disuse of right to water.—A person who has a prescriptive right to a flow of water to a pond or well does not lose his right merely because he has ceased to use his pond or well, and has allowed it to become choked with weeds (x).

Merger and extinguishment of easements and servitudes by a unity of ownership of the dominant and servient tenements.—Easements, profits à prendre, and servitudes may become merged and extinguished in the general rights of property, when the land benefited by, and the land burdened with, the easement, profit, or servitude, pass into the hands of one common proprietor, or when the person possessed of the incorporeal right

(q) *Reg. v. Chorley*, 12 Q. B. 519.
Williams v. Eytton, 27 Law, J., Exch. 176;
 2 H. & N. 771.

(r) *Duncan v. Louch*, 6 Q. B. 904.

(s) *Holmes v. Goring*, 9 Moore, 180; 2

Bing. 76.

(t) *Duncan v. Louch*, 6 Q. B. 904.

(u) *Cawkwell v. Russell*, 26 Law, J.,
 Exch. 34.

(x) *Hale v. Oldroyd*, 14 M. & W. 702.

becomes the owner of the land over or upon which the right is exercised ; for a man cannot, strictly speaking, have an easement in his own land. Thus, if one man erects on his own land a building which wrongfully darkens the windows of the adjoining proprietor, and afterwards purchases the house with the darkened windows, the tort is thenceforth purged by the unity of ownership, and the easement or privilege of enjoying the unobstructed access of light and air annexed to the darkened windows is extinguished, for both houses being in the hand of one person, he may deal with them as it seemeth best to him. If, therefore, he afterwards grants or conveys the house with the darkened windows, the grantee cannot lawfully complain of the nuisance, and has no remedy for its abatement. If one of two houses, which belonged to two different proprietors, has been built so as wrongfully to overhang the other, and they afterwards come into one hand, the wrong is now purged ; so that if the houses come afterwards again into several hands, yet neither party can complain of the wrong done before (*y*).

The obligation imposed in certain cases by custom, prescription, or contract upon the owner of an estate to maintain a fence for the benefit of the owner or occupier of the adjoining land, is an obligation in the nature of a servitude. Where, therefore, adjoining lands, which have once belonged to different persons, one of whom is bound to repair the fences between the two, afterwards becomes the property of the same person, the pre-existing obligation to repair the fences is destroyed by the unity of ownership. And where the person who has so become the owner of the entirety afterwards parts with one of the two closes, the obligation to repair the fences will not revive, unless express words be introduced into the deed of conveyance for that purpose (*z*).

If a man who has a right of common appurtenant (ante, p. 21) becomes himself the owner of the land over which the common extends, the incorporeal right is merged in the legal ownership, and the land is discharged, for a man cannot have common in his own land (*a*) ; and if the owner grants the land to which, before the extinguishment, the right of common was attached, with all easements and profits thereunto "appertaining" or "belonging," these words will not be sufficient to revive or re-create the right (*b*).

When a copyhold tenement, to which a right of common is annexed, becomes vested in the lord by forfeiture, the right of common is not extinguished : it remains by custom annexed to the customary tenement ;

(*y*) *Robins v. Barnes*, Hob. 131 ; Rolle's Abr. Customs (D.), pl. 7. *Battishill v. Reed*, 18 C. B. 696.

(*z*) *Bäyley, J., Boyle v. Tamlyn*, 6 B. & C. 337.

(*a*) *Nelson's case*, 3 Leon. 128. *Saunders v. Oliffe*, Moore, 407. *Tyringham's case*, 4 Rep. 38a.

(*b*) *Clements v. Lambert*, 1 Taunt. 204. *Grymes v. Peacock*, 1 Bulstr. 17.

and though the right is in abeyance whilst the estate remains in the lord, it is re-created or revived by a re-grant of the estate as a copyhold tenement *cum pertinentiis*. If, indeed, the lord grants the fee to a copyholder, the estate can never again become a copyhold estate, and the right of common is extinguished, "for the common first used was gained by custom, and annexed to the estate, and is lost with it" (c).

What sort of unity of ownership is essential to the extinguishment of easements.—For the extinguishment of a prescriptive right by unity of ownership and possession "it is requisite that the party should have an estate in the lands *a quâ*, and in the lands *in quâ*, equal in duration, quality, and all other circumstances" (d). "If," observes Alderson, B., "I am seized of freehold premises, and possessed of leasehold premises adjoining, and there has formerly been an easement enjoyed by the occupiers of the one as against the occupiers of the other, while the premises are in my hands the easement is necessarily suspended, but it is not extinguished, because there is no unity of seizin; and if I part with the premises, the right, not being extinguished, will revive" (e). If a lessor of the dominant tenement takes a week's tenancy of the servient tenement, he does not lose all the servitudes: he would only lose the statutory mode of establishing them; and he would only lose that when it could be said that at the time of granting the lease he could grant the servitude (f).

Revival and re-creation of easements and servitudes which have been extinguished or suspended by unity of ownership.—When an easement or servitude has become extinct by reason of the ownership of the dominant and servient estates having become centered in the same person, and he again conveys away that estate to which the easement or servitude has belonged, the general rule is, that if he merely grants such estate with the appurtenances, the easement is not revived, unless it is a visible apparent easement; but if he grants it with all easements, &c., therewith used and enjoyed, that operates as a revival; and any other words clearly intended to have such an effect will operate in the same manner. If a right of way has become extinguished by unity of ownership of the dominant and servient tenements, and the messuage for which the right of way was anciently used is subsequently severed from the land over which the way passed, and is conveyed "with all ways, roads, rights of road, paths, and passages thereto belonging, or in anywise appertaining," the extinct right of way is not revived, and does not pass by the conveyance of the house, unless it is a visible apparent way (g); "for nothing is more clear than

(c) *Badger v. Ford*, 3 B. & Ald. 155.
Massam v. Hunter, Yelv. 189.

(d) *Rex v. Hermitage*, Carth. 241.

(e) *Thomas v. Thomas*, 2 C. M. & R. 41.

(f) *Bramwell, B., Warburton v. Parks*,
 26 Law J., Exch. 298; 2 H. & N. 64.

(g) *Barlow v. Rhodes*, 1 Cr. & M. 448;
 ante, p. 30.

that, under the word 'appurtenances,' according to its legal sense, an easement which has become extinct, or which does not exist in point of law by reason of unity of ownership, does not pass. If the grantor wishes to revive or create such a right, he must do it by express words, or introduce the terms 'therewith used and enjoyed,' in which case easements existing in point of fact, though not existing in point of law, would be transferred to the grantee" (h). But there is no magic in words; and if the easement is a visible apparent easement, accessorial to the beneficial use and enjoyment of the estate, it will pass, as we have seen, to the grantee of the estate (ante, pp. 29-38).

If the owner of a mill, who has a right of passage for water to his mill through the land of the adjoining landowner, purchases such adjoining land, and becomes the owner both of the mill and of the land over which his watercourse extends, and afterwards aliens the mill, the watercourse and incorporeal right to the free passage of the water to the mill are not extinguished, but pass with the mill as appendant and appurtenant thereto. So if a man hath a dye-house, and there is water running thereto, and afterwards he purchaseth the land upon which the stream runs, and subsequently resells such land, his original right to the watercourse remains (i). But if a man hath a stream of water which runneth in a leaden pipe through the adjoining land, and he buys the land where the pipe is, and cuts the pipe and destroys it, the watercourse is thenceforth extinct, because he thereby declares his intention that the watercourse and the land shall no longer be enjoyed together (k).

Where a way has been extinguished by the unity of seizin of two estates by the partition of the two, the way is revived. Thus it has been laid down as law, "that a way extinguished by unity of possession is revivable afterwards upon a descent to two daughters, where the land through which the way passed is allotted to one, and the other land, to which the way belonged, is allotted to the other sister; and this allotment, without specialty, to have the way anciently used is sufficient to revive it" (l).

The same rule respecting the extinguishment and revival of servitudes by unity of ownership prevailed in the Roman law. When the servitude was a non-apparent servitude, it was merged and extinguished by unity of ownership of the dominant and servient tenements; but when it was an apparent continuing servitude, such as a window enjoying light and air, or lands having drains or watercourses, or ways running through them,

(h) *Plant v. James*, 5 B. & Ad. 794.
James v. Plant, 4 Ad. & E. 764. *Bradshaw v. Eyre*, Cro. Eliz. 570.

(i) *Sury v. Pigot*, Poph. 172; Palm. 444.

(k) Popham, C. J., *Lady Brown's case*, cited Palm. 446.

(l) 1 Jenk. Cent. Ca. 37. Bro. Abr. *Extinguishment*, 15.

the servitude was not extinguished; so that if the tenements were subsequently severed, they would be respectively benefited and burthened with their ancient, manifest, and continuing privileges and obligations (m).

By the French law, "servitudes cease when things are in such a state that it is impossible any longer to make use of them." They revive, if things are re-established in such a manner that they can be made use of, unless a sufficient space of time has already elapsed to raise a presumption that the servitude has been extinguished. Every servitude is extinguished when the estate to which it is due, and that which owes it, are united in the same hands. Servitude is extinguished also by non-usage during thirty years (n).

Effect of the destruction or alteration of the dominant tenement.—When mills or houses which have watercourses, or estovers, or other things appendant or appurtenant to them, be overthrown by the wind, or burned by fire, or fall by any other act of God, if the owner rebuilds them in the same manner as they stood before, they shall have the same ancient rights appendant and appurtenant to the new structure. And although the house or mill falls by the act or default of the owner, or by the wrong of another, yet forasmuch as the durable materials remain, he may rebuild it without the loss of any appendant or appurtenant to it; but it ought to be reconstructed upon the old foundations of the ancient house (o).

Of the maintenance and repair of ways and watercourses.—Every grantee of a right of way or watercourse, to be exercised and enjoyed over or through the land of the grantor, must himself repair the way, if he desires to have it repaired and kept in repair for his use, or if repairs are necessary to prevent the enjoyment of the right becoming an annoyance and nuisance to the owner of the servient tenement. "If I grant a way over my land I shall not be bound to repair it. If I stop it, an action lies against me for the misfeasance, but for the bare non-feasance, viz. in not repairing it; when it is out of repair, no action at all lies (p). So if I grant a right to a watercourse through my land, the grantee is bound to keep the watercourse in proper order and repair; and if it becomes ruinous and obstructed, so that the water floods my lands, the grantee will be responsible for the nuisance" (q).

(m) Dig. lib. 8, tit. 2, 3.

(n) Cod. Civ. art. 703-706.

(o) 4 Co. 86b. 88a.

(p) *Pomfret v. Ricroft*. 1 Wms. Saund.

322; ante, pp. 31, 32.

(q) *Ld. Egremont v. Pulman*, M. & M. 404; cited 1 Q. B. 775, post, ch. 3; ante, p. 31.

SECTION II.

REMEDIES FOR THE INFRINGEMENT OF INCORPOREAL RIGHTS.

Abatement of obstructions to the enjoyment of easements and profits à prendre.—An obstruction to the enjoyment of a right of common, or of a private right of way may be abated as a nuisance (r).

Of the right to distrain beasts wrongfully put upon a common.—Where there is a colour of right to put beasts upon a common, one commoner cannot distrain the cattle of another. If there is no colour of right he may, and therefore he may distrain the beasts of a stranger. In the case of levancy and couchancy, one commoner cannot distrain another's cattle for a surcharge, but must try by a jury the number accommodated to the land. And where any admeasurement lies between commoners to ascertain what quantity of land the commoner has, one cannot distrain the cattle of the other (s). But this general rule may be superseded, and a right to distrain given by an agreement between commoners to restrain the exercise of their privilege to certain specified portions of the common field (t).

Of actions for the infringement of incorporeal rights.—An injury to a right imports a damage, though it does not cost the party one farthing (u). “Whenever,” observes Parke, B., “an act done would be evidence against the existence of a right, that is an injury to the right, and the party injured may bring an action in respect of it” (x). “It is a vain thing to imagine a right without a remedy, for want of right and want of remedy are reciprocal” (y).

Actions for taking manure from commons.—A commoner may maintain an action for an injury done to the common by taking away from thence the manure which was dropped on it by the cattle, though his proportion of the damage may be inappreciable, for the repetition of a tortious act of this kind might eventually be made the foundation of a right, to the serious injury of the other commoners. The action may be brought by the lord, or any one of the commoners, and all the commoners may maintain separate actions for the wrong (z).

Actions for surcharging of commons.—If one commoner puts more cattle on the common than he is entitled to do, he is liable to be sued by all or any one of the other commoners who have a right to depasture

(r) Post, ch. 3, s. 2.

(s) *Hall v. Harding*, 1 W. Bl. 674.

(t) *Whiteman v. King*, 2 H. Bl. 4.

(u) Holt, C. J., *Ashby v. White*, 2 Ld.

Raym. 955. *Bower v. Hill*, 1 Sc. 526.

(x) *Nicklin v. Williams*, 10 Exch. 227.

(y) Holt, C. J., 2 Ld. Raym. 953.

(z) *Pindar v. Wadsworth*, 2 East, 159.

beasts upon the same common; and it is no answer to the action that the plaintiff has himself surcharged the common, or that the damage is insignificant, for the wrong-doer might, by repeated torts of this sort, eventually enlarge his right. But if the beasts have been put upon the common by the lord of the manor, or with his license and permission, the commoner cannot maintain an action, unless he has sustained actual damage, and can show that there was not a sufficiency of pasture for his beasts (a). Any act that totally destroys the herbage, as feeding innumerable rabbits on a common, will support an action against the lord (b).

Actions for obstructions to the enjoyment of a private right of way.—Every person who sustains injury from an unknown and dangerous obstruction to the enjoyment of a private right of way is entitled to an action for damages, whether the unexpected and dangerous obstruction be caused by the owner of the land over which the way exists or by a stranger, and whether the way be claimed by prescription or grant, or be enjoyed only under a parol license or permission, which has not been revoked; for if a landowner gives his neighbour permission to use a beaten track or path across the land of such landowner, and the latter places a dangerous obstruction in the path, which causes injury to the licensee, he will be responsible in damages to the latter, if he has failed to give him timely notice and warning of the obstruction (c). A continuing obstruction to the exercise and enjoyment of an incorporeal right is a continuing nuisance; so that if an action has been brought, and damages recovered for the injury, and the nuisance is not then abated, the continuance of the obstruction constitutes a fresh injury, for which another action may be brought, and so, toties quoties, until the obstruction is removed (d).

Of the parties to be made plaintiffs—Tenant and reversioner.—The action for an injury to real property resulting from obstructions to the enjoyment of profits à prendre, or easements appurtenant to messuages or tenements, may be brought by the occupier in respect of the immediate injury to his possessory interest, and by the reversioner in respect of the deterioration in the marketable value of the property, when the damage done is of a permanent character.

An obstruction to the exercise of a private right of way appurtenant to lands or tenements which, if allowed to continue unopposed, would be evidence against the enjoyment of the right, is, of course, an injury to

(a) *Hobson v. Todd*, 4 T. R. 73. *Smith v. Feverell*, 2 Mod. 7. *Greenhow v. Ilsley*, Willes, 619.

(b) *Wells v. Walling*, 2 W. Bl. 1283.

(c) Post, ch. 3, s. 1. *Corby v. Hill*, 4 C. B., N. S. 556; 27 Law, J., C. P. 318.

(d) *Shadwell v. Hutchinson*, 4 C. & P. 383; post, ch. 8.

the reversioner in respect of which an action for damages is maintainable (e). "The erection of a wall," observes Maule, J., "across a way—assuming, of course, that there was no contract as between the tenant and the defendant—would be an injury to the reversion, although such wall might be pulled down before the plaintiff became entitled to the actual possession of the land; and there might be such a locking and chaining of a gate as would amount to as permanent an injury to the plaintiff's reversionary interest as the building of a wall" (f). But a reversioner cannot maintain an action against a stranger for merely entering upon his land held by a tenant on lease, though the entry be made in the exercise of an alleged right of way, such an act during the existence of the tenancy not being necessarily injurious to the reversion. Neither can he maintain an action in respect of an obstruction of a publick way leading to his property, unless he can show, either that the obstruction is of a permanent character, or that it would afford evidence against the existence of the right, if it was allowed to continue unopposed. For the publick injury the landlord has a remedy, as one of the publick, by indictment, and he is not himself personally damnified merely by his tenant's being temporarily prevented from enjoying his house in so ample a manner as he might otherwise have done. But if the obstruction appears to be of a permanent character, or professes, either by notice affixed, or in any other way, to deny the publick right, and so lead to an opinion that no road was there, the value of the house might be lowered in publick estimation, and pecuniary loss might follow, for which an action might be maintained by the reversioner (g).

An action is also maintainable by the reversioner of a mill demised to a tenant, for diversion by a stranger of water from the mill-head; for if the diversion was allowed to continue with the knowledge of the reversioner, and without interruption from him or his tenant, it might eventually be made the foundation of a legal right to divert the water, to the serious injury of the inheritance. Where permanent damage has been done to property let on lease by the erection of a wall or hoarding obstructing ancient lights, and lessening the value of the property in the market, there is an injury to the reversion, in respect of which the reversioner is entitled to maintain an action (h), as well as an injury to the possession, in respect of which the occupier may sue. A wooden hoarding of an unsubstantial character may cause permanent injury to the property, by

(e) *Battisill v. Reed*, 18 C. B. 696.

(f) *Kidgill v. Moor*, 9 C. B. 378.

(g) *Dobson v. Blackmore*, 9 Q. B. 1004;
16 Law, J., Q. B. 233. *Hopwood v. Schofield*, 2 Mood. & Rob. 34. *Kidgill v. Moor*,

9 C. B. 379.

(h) *Jesser v. Gifford*, 4 Burr, 2141; 3 Leon. 209. *Shadwell v. Hutchinson*, 1 M. & M. 350.

the obstruction it offers to the passage of light and air, and may be an injury to the reversion (*i*).

If the windows of a house occupied by the servant of the owner have been unlawfully darkened or obstructed, the owner may sue for the immediate injury as the occupier of the house, the occupation of the servant being the occupation of the master (*k*); but if the house is in the possession of a lessee paying rent, the action should be brought in respect of the injury to the reversion; and if there is a lease in writing, it must be produced (*l*).

Parties to be made defendants.—If a man erects on his own land an obstruction to the access of light and air to his neighbour's ancient windows, and then demises the land with the obstruction upon it, an action will lie both against him and his tenant for the continuance of the obstruction (*m*). A clerk who has superintended the erection of a building by which ancient lights were darkened, and who alone directed the workmen, may be joined as a co-defendant with the contractor who appointed him to superintend the progress of the building (*n*).

The actual occupier of lands burthened with the servitude of keeping up a boundary-fence for the benefit of the adjoining occupier or landowner is the proper party to be made defendant in an action for neglecting to maintain and repair the fence, for it is the duty of the actual occupier, and not of the landlord, to keep up the fences (*o*). If the occupier of a house or land, having control over all workmen upon his premises, suffers such workmen to bring stone and earth therefrom, and place them in a highway adjoining the house, he will be responsible for any damage that may be caused to third parties by the obstruction (*p*); and so also will the workman who actually placed the obstruction in the thoroughfare (*q*).

Of the plaintiff's declaration.—*Venue.*—*Statement of the cause of action.*—The venue in declarations for obstructions to the enjoyment of profits à prendre and easements is local, and the cause of action must be laid in the county in which it arose. When the easement is claimed by grant, it is not necessary to mention or refer to the deed of grant in the declaration. It is enough for the plaintiff to allege that he is entitled to it by reason of his possession of a particular messuage or land (*r*). But the plaintiff's right to the enjoyment of the easement should in all cases

(*i*) *Metrop. Assn. v. Petch*, 5 C. B., N. S. 504; 27 Law, J., C. P. 332.

(*k*) *Bertie v. Beaumont*, 16 East, 39.

(*l*) *Cotterill v. Hobby*, 4 B. & C. 465.

(*m*) *Roswell v. Prior*, 2 Salk. 460; 12 Mod. 686.

(*n*) *Wilson v. Peto*, 6 Moore, 47. And see post, ch. 19.

(*o*) *Cheetham v. Hampton*, 4 T. R. 816;

Buller, J. Rider v. Smith, 3 T. R. 768. *Rooth v. Wilson*, 1 B. & Ald. 59.

(*p*) *Burgess v. Gray*, 1 C. B. 591; post, ch. 3, s. 2.

(*q*) And see further, as to plaintiffs and defendants, post, ch. 19.

(*r*) *Northam v. Hurley*, 22 Law, J., Q. B. 185; 1 Ell. & Bl. 668.

be asserted on the face of the declaration (*s*). In all actions for disturbance of an easement or privilege, the obstruction ought to be charged on the pleadings in the thing itself in which the party has a right. Thus, if the declaration complains that the plaintiff's right of common was obstructed by the locking of a gate, or his right to take water from a cistern by the blocking up of a way or passage leading to the cistern, the declaration should assert and set forth the plaintiff's right of common, or right of taking water from the cistern, by reason of his possession of a messuage, tenement, or land, and allege that the plaintiff had a right to go through the door with his cattle to enjoy his right of common, or along the way or passage in order to take water from the cistern (*t*).

The plaintiff must show how his right arises; but it is sufficient for the plaintiff to declare, on his possession of a right of way, or a right of common, or other profit or easement, by describing it, and claiming it by reason of his possession of the land. His possession is enough; and it is unnecessary in an action for injury to it to show whether it arises from grant or prescription. So, in the case of an injury to a market or a ferry. In the case of an injury to the plaintiff's mill, where the plaintiff has a right to have the grain of others ground there by tenure, prescription, or custom, it is enough to allege the plaintiff's possession and the defendant's obligation to grind; which is, indeed, part of the plaintiff's right in a general form, as by reason of the possession of a house, or that all the inhabitants ought to grind there, and that the defendant is an inhabitant; which is a description of the right by tenure in the one case, and by custom in another.

"There is another class of cases, in which an obligation is cast on the defendant to repair a way to a close of the plaintiff over the defendant's land, to repair fences against the plaintiff's land, or to repair a wall adjoining the plaintiff's house. In these cases, it is enough to state in a general way the defendant's obligation by reason of his possession of his land, or wall, or an equivalent averment. One reason given is, that in such cases a charge is laid upon the right of another, which, it may be, the plaintiff cannot particularly know" (*u*). In a declaration by a plaintiff for an injury sustained by him from an obstruction placed in a private way, which the plaintiff was authorized to use by the parol permission of the owner of the soil, it is enough for the plaintiff to describe the road, and assert that he had, by the permission of the owner and occupier of the soil, a right to use the road, and that the defendant wrong-

(*s*) *Whaley v. Laing*, 2 H. & N. 476;
27 Law, J., Exch. 422. *Laing v. Whaley*,
28 lb. 685.

(*t*) *Tebbutt v. Selby*, 6 Ad. & E. 786;

1 N. & P. 710.

(*u*) *Parke, B., Metcalfe v. Hetherington*,
11 Exch. 271; 24 Law, J., Exch. 319.

fully placed an obstruction in the road, *per quod* the plaintiff was injured (*x*).

Where a declaration by a reversioner alleged that the plaintiff was entitled to a right of way for his tenants over a certain close of the defendant, and that the defendant wrongfully chained and fastened a certain gate standing in and across the said way, and wrongfully kept the same so fastened, and so obstructed the way, whereby the plaintiff was injured in his reversionary estate, it was held that the declaration set forth a sufficient cause of action, and that the plaintiff's reversionary interest might be injured by the acts complained of (*y*).

If the declaration is for the obstruction of a flow of water through a drain, it should set forth the right of the plaintiff to the flow of water through the drain, and that the defendant wrongfully obstructed it, by throwing therein large quantities of stones, soil, and rubbish, &c., as the case may be, stating the nature of the obstruction, whereby the lands of the plaintiff became flooded and greatly injured, and his crops of corn, hay, &c., were damaged and destroyed, and the plaintiff was put to great expenses in draining off the water and restoring his land to a state of good cultivation, claiming damages (*z*).

A declaration setting forth the plaintiff's possession of a house, and alleging that the defendant wrongfully excavated beneath, or contiguous to, the foundations of the house, without leaving proper support for the said foundations, and thereby caused the house to fall; or that he wrongfully pulled down and destroyed the foundations of the house; or that he dug beneath the house, and undermined it, so that the walls cracked, and the plaintiff was obliged to remove with his family, and hire another house, discloses a good cause of action (*a*). If it appears on the face of the declaration that the alleged wrongful act was done on the adjoining land, the declaration is not now demurrable, because it does not show any right to support from the adjoining land, unless it appears upon the face of the declaration that the alleged wrongful act was done by the defendant himself, on his own land. If the defendant does not appear upon the face of the declaration to be the owner of the adjoining land, he is, *prima facie*, a wrongdoer; for, if a house is *de facto* supported by the soil of a neighbour, this is a sufficient title to the support against any one but that neighbour, or one claiming under him. A man who should prop his house up by a shore, resting on his neighbour's ground, would have a right of action against a stranger who, by removing it, should cause the house to fall;

(*x*) *Corby v. Hill*, 4 C. B., N. S. 556; 27 Law, J., C. P. 318. And see further, ante, pp. 12, 68. *Holford v. Hankinson*, 5 Q. B. 584.

(*y*) *Kidgill v. Moor*, 9 C. B. 378.

(*z*) *Hewlins v. Shippam*, 5 B. & C. 221.

(*a*) *Rogers v. Taylor*, 2 H. & N. 829; 27 Law, J., Exch. 175. *Bonomi v. Backhouse*, ib. Q. B. 379; 33 Law, T. R., H. L. 331.

though he could have no action against his neighbour, if the latter took it away, and caused the same damage (*b*).

If the damaged buildings are in the possession of tenants to whom they have been demised, and the plaintiff claims compensation for damage done to his reversion, the declaration should set forth that the buildings are in the occupation of certain tenants of the plaintiff, that the reversion of the said buildings is vested in the plaintiff, and that the plaintiff, by reason of his reversionary interest in them, is of right entitled to have the buildings supported laterally by the adjoining land of the defendant, and showing that, by the wrongful withdrawal of the necessary support, the buildings became uninhabitable, and the plaintiff was injured in his reversionary estate (*c*).

Declarations for an obstruction to the plaintiff's lights or privileged windows should set forth the plaintiff's possession of a dwelling-house, describing it by name and situation, and of certain windows belonging to the said dwelling-house, and that the plaintiff had a right to the free passage for the light and air across the defendant's land to the windows, and that the defendant wrongfully erected a wall or building so near to the windows that the light and air were prevented from passing to the windows, whereby they became darkened, and the dwelling-house of the plaintiff was rendered close, dark, and uncomfortable, and unfit for habitation, and the plaintiff was greatly incommoded in his possession and enjoyment thereof, and claims damages, &c. When the declaration is for an injury to the plaintiff's reversionary estate, it should allege that the plaintiff was entitled to the reversion of the dwelling-house, and that, by means of the obstruction to the free passage of light and air caused by the defendant, the plaintiff was injured in his reversionary estate (*d*).

What may be given in evidence under the plea of not guilty—*Not guilty by statute*.—In actions for obstructions to the enjoyment of easements and profits à prendre, the plea of not guilty operates as a denial only of the obstruction, and not of the plaintiff's right; and no other defence than such denial is admissible under that plea. All other pleas in denial must take issue on some particular matter of fact alleged in the declaration. If the facts stated in the inducement are not intended to be admitted, they must be expressly traversed and denied (*e*). When, however, the act complained of has been done in the exercise of some statutory authority, enabling the defendant to give the special circumstances of justification in evidence under the plea of not guilty, the plaintiff's right to do the act,

(*b*) *Jeffries v. Williams*, 5 Exch. 800; 20 Law, J., Exch. 14. *Bibbey v. Carter*, 7 Week Rep. Ex. 193.

(*c*) *Bonomi v. Backhouse*, 33 Law, T. R. 331 H. L. *Bibbey v. Carter*, 7 Week Rep.

193.

(*d*) *Metrop. Assn. v. Petch*, 5 C. B., N. S. 504; 27 Law, J., C. P. 330.

(*e*) Reg. Gen. Hil. Term, 16 Vict. 1 Ell. & Bl., App. lxxxi.

in the exercise of the powers conferred upon him by statute, may be given in evidence under the plea of not guilty, provided he has inserted "by statute" in the margin of his plea (f).

Traverse of the right.—If the defendant denies the existence of the right claimed by the plaintiff, he must, as we have seen, traverse it in the very words in which it is asserted in the declaration (ante, p. 13). Under traverse of the right, the defendant may show that the right was granted by a mere parol license or agreement, not under seal, and that the defendant, finding the exercise and enjoyment of the right troublesome and inconvenient, had revoked the license, or refused to perform the agreement, and had prevented any further exercise and enjoyment of the privilege (g).

Plea of leave and license.—Under a plea of leave and license, it may be shown that the plaintiff, having an easement of light and air to his ancient windows across the defendant's area, gave the defendant a parol license or permission to put a skylight over his area, and that the license had been acted upon and executed by the defendant, and the skylight built, and that the building of the skylight caused the injury of which the plaintiff complains (h).

Evidence at the trial will, of course, depend upon the pleas upon the record. Under the plea of not guilty, the plaintiff must prove that the injurious act was done by the defendant, or by his procurement (i). If the existence of the incorporeal right is denied by the pleadings, the plaintiff must establish his title by proof of a grant, express or implied (ante, p. 27), or of uninterrupted user and enjoyment as of right (ante, pp. 41–53), for the full period required by the Prescription Act. If all the acts of user and enjoyment have taken place during the occupation of the land by tenants, their submitting to them will not, as we have seen, bind the owner of the land, without proof of his being also aware of them; but, if the acts of user have been open and notorious, and have gone on for a great length of time, a jury may presume therefrom that the owner knew of them (k).

All circumstances tending to show that no grant could have ever existed, or have lawfully been made, are, as we have seen, admissible in evidence, to show that there was no enjoyment as of right, within the meaning of the statute (ante, pp. 28, 41–47). When the plaintiff rests his claim to an easement upon the defendant's land, upon a prescriptive title from twenty years' enjoyment as of right, and without interruption for

(f) Ante, p. 13; and post, ch. 20.

(g) *Hewlins v. Shippam*, 5 B. & C. 221.
Cocker v. Cowper, 1 C. M. & R. 418.
Wood v. Leadbitter, 13 M. & W. 898.

(h) *Winter v. Brockwell*, 8 East, 809.

And see ante, p. 53.

(i) Ante, p. 10; post, ch. 19, s. 1.

(k) *Davies v. Stephens*, 7 C. & P. 570; ante, p. 28.

the period of twenty years, the claim may be answered by proof of a license written, or parol for a limited period, falling short of the twenty years relied upon; for every time that leave is asked for and obtained, there is, as we have seen, a break in the continuance of the enjoyment (ante, pp. 50, 51).

If the plaintiff proves a larger and more extended right than he claims in his declaration, the proof is not objectionable on the ground of variance, provided the right claimed is included in the more extended right proved, and is not inconsistent with it (*l*).

Proof of right of way.—Proof that the plaintiff has used a way for various purposes, whenever he required it, for twenty years, is *prima facie* evidence of a right of way for all purposes, from which a jury may infer a general right; but proof of user for one purpose, or for particular purposes, will not raise an inference of a general right (*m*). Proof of the exercise of a right of way for twelve years for all purposes, and for twenty years for the only purposes for which the defendant required it, is sufficient to establish the existence of a general right (*n*). When the right depends upon express grant, the nature and extent of the right are defined by the express terms of the grant. When it rests upon user and enjoyment, the extent of the right is defined and limited by the extent of the user and enjoyment; and it is, in general, a question for the jury in each particular case as to whether the evidence of user shows a general right of way, both for horses and carriages, and for all reasonable and necessary purposes, or only a restricted and limited right for a particular purpose (*o*). If the plaintiff has a right to go backwards and forwards with carts and carriages, and it is reasonable that he should have room to turn round, he will have a right to go on the adjoining land, if the road is not wide enough for the purpose; but what is a reasonable exercise of a right of way is a question for a jury (*p*).

Proof of a right to the free access of light and air.—The right to the free access of light and air across the adjoining land of a neighbouring proprietor may be established, as we have seen (ante, p. 47), by proof of uninterrupted user and enjoyment for twenty years. But a right to the free access of light and air from uninterrupted user and enjoyment does not extend to open spaces of ground and yards, unless they adjoin an ancient windmill. Thus, where a saw-pit and timber-yard had been placed close to the edge of the adjoining property, it was held that the pit and yard might be darkened at any time, and the access of air thereto

(*l*) *Duncan v. Louch*, 6 Q. B. 914.

(*m*) *Cowling v. Higginson*, 4 M. & W. 255.

(*n*) *Dave v. Heathcote*, 25 Law, J., Exch. 245.

(*o*) *Ballard v. Dyson*, 1 Taunt. 287. *Bower v. Hill*, 2 Sc. 535. *Brunton v. Hall*, 1 G. & D. 207.

(*p*) *Hawkins v. Carlines*, 27 Law, J., Exch. 44.

impeded by the erection of buildings by the adjoining landowner. But if the open space admits the wind to an ancient windmill, the owner of the open space cannot build over it, so as to take the wind out of the miller's sails (*q*). Thus, where one erected a house so high that the wind was stopped from the windmills in Finsbury Fields, it was adjudged that the house should be broken down (*r*). So, where two yards of the top of a new house prevented the wind from coming to a windmill, and the miller consequently could not grind his corn, the Court ordered the two yards of the house to be taken off (*s*).

Proof of obstructions to the access of light.—To establish a cause of action for an obstruction to the access of light and air to the plaintiff's ancient windows, the plaintiff must prove a substantial privation of light, sufficient to render the occupation of his house comparatively uncomfortable, or to prevent him from carrying on his business as beneficially and profitably as he had formerly done. The mere diminution of a ray or two of light will not suffice for the maintenance of an action (*t*). When the action is brought by a reversioner in respect of an injury to his reversionary estate, it must be shown that the obstruction is of such a nature as to cause a permanent injury to the property (*u*).

Proof of the right to an ancient weir and fishery in a navigable river.—The right to have a weir in the channel of a navigable river for the purpose of catching fish is, as we have seen, a right founded on grant or prescription (ante, p. 43); and the right to ancient weirs has in some instances been legalised by statute, although they totally obstruct the navigation of the river (*x*).

Proof of the servitude of maintaining and repairing fences.—The mere fact of an owner or occupier having repaired a fence does not, as we have seen, afford any ground for presuming that his land was burthened with the servitude of keeping up the fence for the benefit of his neighbour; because it is for his own benefit to keep up a fence for the purpose of preventing his own cattle from straying from his land, and committing trespasses upon the adjoining land. If it be proved that the defendant had been threatened with legal proceedings, if he did not repair the fences, or that, if he did not repair, and the plaintiff became damnified in consequence of his cattle trespassing upon the lands of other persons, the plaintiff would look to him for compensation, and that the defendant then

(*q*) *Roberts v. Macord*, 1 Mood. & Rob. 230.

(*r*) *Winch, J.*, Vin. Abr. NUISANCE, G. 10.

(*s*) *Goodman v. Gore*, 2 Rolle, Abr. 704, pl. 23. *Trahern's case*, Godb. 283.

(*t*) *Back v. Stacey*, 2 C. & P. 466.

Parker v. Smith, 5 ib. 438. *Pringle v. Wernham*, 7 C. & P. 378. *Wells v. Ody*, ib. 410.

(*u*) *Metrop. Assn. v. Petch*, 5 C. B., N. S. 504; ante, p. 64.

(*x*) *Williams v. Wilcox*, 8 Ad. & E. 386.

repaired, this would be some evidence of the defendant's being under a legal obligation to maintain and repair the fence.

An allegation in a declaration that the defendant, by reason of his possession of a particular close, was bound to repair a fence dividing such close from the adjoining land, is proved by the production of a deed whereby the defendant has undertaken the performance of that duty (y).

Inadmissibility in evidence of statements and declarations by a tenant in derogation of the title of his landlord.—"You cannot," observes Lord Campbell, "admit in evidence the declarations of a tenant which derogate from the title of the reversioner. It would be very mischievous if it were in the power of a tenant to destroy a profit à prendre belonging to the land which he occupies, or to impose a servitude upon it. There is no difference in this respect between destroying an easement and creating one. If the tenant might say that the land enjoyed no right of way, he might also say that it was liable to an easement for taking water, or to a profit à prendre, turbary, or other common, and create evidence of servitude against the reversioner. The acquiescence of a tenant cannot prejudice his landlord (z), and, *à fortiori*, his declarations cannot" (a).

Of the damages recoverable in actions for the infringement of incorporeal rights (b).—Wherever the exercise or enjoyment of an incorporeal right has been obstructed, damages are, as we have seen, recoverable, though no actual or specific damage in point of fact can be proved; for every unresisted obstruction to the enjoyment of the right would be evidence against the existence of the right, and therefore highly injurious to the party claiming it. Therefore an action may be maintained by a commoner for an injury done to his common, without proving actual damage. And whenever there has been an obstruction to the exercise of a right of way, which, if acquiesced in for twenty years, would be evidence against the existence of the right, there is an injury, in respect of which damages are recoverable, although there is no proof of actual pecuniary damage (c).

Where the occupier of a field, who had a right to have a fence separating his field from the adjoining land repaired at the expense of the adjoining occupier, took in the horse of a neighbour for the night, and the horse got through the boundary-fence into the servient tenement, and fell into a ditch and was killed, it was held that the occupier of

(y) *Boyle v. Tamlyn*, 6 B. & C. 338.

(z) *Daniel v. North*, 11 East, 372.

(a) *Papendick v. Bridgwater*, 5 Ell. & Bl. 177.

(b) As to damages in general, see post, ch. 20, s. 1.

(c) *Bower v. Hill*, 1 Sc. 533; 1 Bing. N. C. 649; post, ch. 21.

the dominant tenement was entitled to recover the full value of the horse (*d*).

In all cases of nuisance from obstructions to the free access of light and air to ancient windows (post, ch. 3), damages are recoverable by the reversioner, because the injury is an injury to a right; and if the reversioner were to be prevented from bringing his action during the existence of the lease, the testimony of the witnesses who could speak to the windows being ancient windows might be lost (*e*).

When an action is brought by a reversioner for an injury to his reversionary interest, from a temporary obstruction of a right of way theretofore used by the tenants and occupiers of his land, nominal damages only are, in general, recovered in the first instance, as the defendant is liable to another action every day that he continues the obstruction; and it is to be presumed that he will immediately remove it; but if he persists in continuing the obstruction, and a second action is brought for the continuance of the nuisance, exemplary damages will be given, in order to compel him to abate it (*f*).

(*d*) *Rooth v. Wilson*, 1 B. & Ald. 59; ante, p. 46.

(*e*) *Ld. Tenterden, C. J., Shadwell v. Hutchinson*, 1 M. & M. 352. *Jesser v.*

Gifford, 4 Burr. 705, 2143.

(*f*) *Hopwood v. Schofield*, 2 Mood. & Rob. 35. *Battishill v. Read*, 18 C. B. 715; 25 Law, J., C. P. 200; post, ch. 3, s. 2.

CHAPTER III.

OF NUISANCES AND INJURIES FROM THE NEGLIGENT USE AND MANAGEMENT OF REAL PROPERTY, AND FROM KEEPING FEROCIOUS ANIMALS.

SECTION I.—*Of nuisances and injuries from the negligent management of real property, and from keeping ferocious animals*—What amounts to a nuisance—Liability of landlords and occupiers of premises on which a nuisance exists—Offensive smells—Noisome trades—Noisy nuisances—Defilement of springs and streams—Dangerous premises—Obstructions in private and public ways—Dangerous excavations—Un-guarded areas and cellar-doors—Steam-engines and windmills adjoining highways—Obstructions in navigable rivers—Injuries from the fall of ruinous buildings—Ruinous and defective fences—Negligent management of railway stations—Ruinous and insecure railway bridges, viaducts, and

embankments—Negligent management of canals and docks—Injuries to servants and guests from dangerous premises—Defective hoisting tackle in mines—Insecure scaffolding and ladders—Injuries from ferocious animals.

SECTION II.—*Of the abatement of nuisances—Statutory remedies and penalties—Actions for damages*.—Abatement of nuisances on private property, public thoroughfares, and navigable rivers—Nuisances from gas-works—Private injuries from public nuisances—Notice before action—Continuing nuisances—Parties to actions for nuisances—Pleadings, defences, evidence, and damages recoverable.

SECTION I.

OF NUISANCES AND INJURIES FROM THE NEGLIGENT USE AND MANAGEMENT OF REAL PROPERTY, AND FROM KEEPING FEROCIOUS ANIMALS.

Of nuisances.—The term nuisance, derived from the French word *nuire*, to do hurt or to annoy, is applied in the English law indiscriminately to infringements upon the enjoyment of territorial and personal rights. A man may become responsible for a nuisance by erecting a building which overhangs the house or land of his neighbour, or by constructing a cornice, or fixing a spout, or any projection which causes, or has a tendency to cause, an unnatural quantity of rain-water to

descend on his neighbour's house and land (*g*); also by erecting and working a noisy smith's forge, or noisy workshops (*h*), or a stinking tallow-furnace, smelting-house, dye-house, lime-kiln, tan-pit, privy, or hog-sty (*i*), or making a cesspool, the filth from which percolates through the soil, and contaminates the water of his neighbour's well or spring (*k*), or burning lime or bricks, or erecting a glass-house or brew-house so near to a dwelling-house that the smoke and smell thereof enter the house and render it unfit for habitation (*l*), or setting up a lime-pit for cleaning skins, or a dye-house, and letting the drainage therefrom run into a watercourse or pond, and corrupt the water, or destroy or deteriorate the fish and the fishing (*m*), or disturbing a decoy-pond by the firing of guns in the neighbourhood of the pond (*n*), or stopping or diverting water that used to run to another's mill (*o*).

Nuisances from the non-repair, or from neglecting to cleanse sewers, drains, and watercourses.—Every occupier is bound to prevent the filth from his drains or cesspools from filtering through the ground into his neighbour's house or land. It is a charge or duty laid on him of common right, for neglect of which he is answerable (*p*). Every grantee also of an artificial drain or watercourse constructed for the passage of water through the land of the grantor, for the use and benefit of the grantee, is bound to maintain and repair the drain and watercourse and keep it in proper order; and if he neglects so to do, and the watercourse becomes obstructed so that the grantee's surplus water floods the land of the grantor, the latter is entitled to compensation in damages for the nuisance (*q*).

The grantee of a right of passage for waste-water from his messuage or tenement, through a drain or watercourse in the land of the grantor, is guilty of a nuisance if he allows the foul water and filth from privies or water-closets to enter the drain; and the grantor of the easement or the owner of the land through which the right of watercourse extends may stop up the watercourse for the purpose of abating the nuisance (*r*). Every landowner who constructs a sewer on his own land, and uses it for the purpose of draining his own premises, is bound to keep the filth from

(*g*) *Penruddock's case*, 5 Co. 205; *Baten's case*, ib. 90. *Reynolds v. Clark*, Fort. 212. *Fay v. Prentice*, 1 C. B. 828.
(*h*) *Bradley v. Gill*, Lutw. 69. *Elliotson v. Feetham*, 2 Bing. N. C. 134.

(*i*) *Poynton v. Gill*, *Morley v. Pragnell*, Cro. Car. 510. *Jones v. Powell*, Hutt. 135. *Bliss v. Hall*, 4 Bing. N. C. 183.

(*k*) *Norton v. Scholefield*, 9 M. & W. 665.

(*l*) *Walter v. Selfe*, 4 De Gex & Sm. 321; 20 Law, J., ch. 433. *Jones v. Powell*, Palm. 539.

(*m*) *Aldred's case*, 9 Co. 59a.

(*n*) *Keble v. Hickeringill*, 11 Mod. 74, 130; 3 Salk. 9; Holt, 14. *Carrington v. Taylor*, 11 East, 571.

(*o*) F. N. B. 184.

(*p*) *Tenant v. Golding*, 1 Salk. 21.

(*q*) *Ld. Egremont v. Pulman*, M. & M. 404, cited *Bell v. Twentyman*, 1 Q. B. 775. *Hoare v. Dickinson*, 2 Ld. Raym. 1568. Ante, p. 61.

(*r*) *Cawkwell v. Russell*, 26 Law, J., Exch. 35.

this sewer from becoming a nuisance to the adjoining occupiers; and if, by reason of an original faulty construction of the sewer, the filth therefrom percolates through the soil and floods the cellars of the adjoining occupiers, the landowner will be responsible for the nuisance, although such occupiers are his own tenants (s). But a landlord who builds houses, and constructs a sewer through his own land for the purpose of draining them, and makes drains from each house into the sewer, does not thereby render himself responsible to his own tenants for the repair of the sewer, or for injuries that may be occasioned to them from overflowings of the sewer; for the grantor of an easement of a right of watercourse or passage for water through his land is not, as we have seen, bound to keep the watercourse in repair for the benefit of the grantee, unless he has by express contract taken that duty upon himself. It is the grantee of the easement who is bound to keep the drain or watercourse in proper order and prevent it from becoming a nuisance (ante, pp. 31, 61).

Nuisances from privies, chimneys, and manufactories—Liability of the landlord and occupier.—If a nuisance be created on premises, and a man purchases the premises with the nuisance upon them, though there be a demise for a term at the time of the purchase, so that the purchaser has no opportunity of removing the nuisance, yet by purchasing the reversion with the existing nuisance, he makes himself liable for the continuance of the nuisance. But if, after the reversion is purchased, the nuisance be erected by the occupier, the reversioner incurs no liability; yet, in such a case, if there were only a tenancy from year to year, or any short period, and the landlord chose to renew the tenancy after the tenant had erected the nuisance, that would make the landlord liable. He is not to let the land with the nuisance upon it (t).

A landowner who creates a nuisance upon his land, or purchases land with an existing nuisance upon it, cannot, by granting or conveying the land to another, get rid of his responsibility on the ground that he has no longer any control over the nuisance. "Before his assignment over he was liable for all consequential damages; and it is not in his power to discharge himself by granting it over; more especially where he grants it over reserving rent, whereby he agrees with the grantee that the nuisance should continue, and has a recompense, viz. the rent for the same; for, surely, when one erects a nuisance, and grants it over in that manner, he is a continuor with a witness. Suppose the lessor or assignor had been seized in fee, and had erected this nuisance, and then infeoffed another over, he had conveyed this as a nuisance, and *causa causæ est causa causati*. And if a wrong-doer conveys his wrong over to another, whereby he puts

(s) *Alston v. Grant*, 3 Ell. & Bl. 128.

(t) *Littledale, J.*, 1 Ad. & E. 827.

it out of his power to redress it, he ought to answer for it. And it is a fundamental principle of law and reason, that he that does the first wrong shall answer for all consequential damages; and the original erection does influence the continuance, and it remains a continuance from the very erection, and by the erection, till it be abated" (u).

If a landlord erects privies in such a situation that the use of them must necessarily create a nuisance, and the privies are demised to tenants who use them and create a nuisance, the landlord will be responsible for the erection and continuance of the nuisance (x). And whenever the very existence of the thing demised constitutes a nuisance, the landlord is responsible. This has been held to be the case where the thing demised consisted of a wall erected so as to impede the access to a publick market (y), or obstruct the access of light and air to ancient windows (z); a dam or mound of earth stopping up the channel of a river or watercourse, or keeping a mill-pond at an undue elevation (a); a dangerous excavation made by order of the landlord, and left unguarded and unfenced by the side of a publick thoroughfare (b). But if the landlord demises tenements and premises which are not in themselves a nuisance, but may or may not become a nuisance, according to the mode in which they are used by the tenant, the landlord cannot be made responsible for a nuisance created upon them by the tenant. He is not responsible for enabling the tenant to commit a nuisance, if he pleases. Therefore, where the landowner erected a coffee-shop with a low chimney under the plaintiff's windows, and let the coffee-shop to a tenant who lighted a fire in the chimney, and created a great smoke, which penetrated the plaintiff's dwelling-house, and caused a nuisance, it was held that the landlord was not responsible for this nuisance, as the tenant could have burnt coke or charcoal in the chimney, and have used the chimney without necessarily creating a great smoke, or might have abstained from making fires at all when the wind was in such a direction as to carry the smoke to the plaintiff's house (c). An occupier who uses premises demised to him so as to create a nuisance is, of course, always responsible for the consequences of his wrongful act (ante, p. 75).

Nuisances from the defilement of springs and running streams.—We have already seen that the right to have a stream flow in its natural state is an incident to the property in the land through which it passes, and that all may reasonably use the water who have a right of access to it. Every

(u) Per Cur. *Roswell v. Prior*, 12 Mod. 689. *Thompson v. Gibson*, 7 M. & W. 462.

(x) *Rex v. Pedly*, 1 Ad. & E. 822.

(y) *Thompson v. Gibson*, 7 M. & W. 456.

(z) *Roswell v. Prior*, ante, p. 65.

(a) Roll's Abr. NUISANCE, K. 2.

(b) *Leslie v. Pound*, 4 Taunt. 649.

Bishop v. Trustees Bed. Charity, 28 Law. J., Q. B. 215.

(c) *Rich v. Easterfield*, 4 C. B. 805.

person, therefore, who throws dirt and rubbish into the stream so as to block up the channel, or defiles the water with gas refuse, and filth, and prevents the riparian proprietors and others from having the beneficial use of the water they have been accustomed to have, is guilty of a nuisance, and may be made responsible in damages(*d*), unless he has gained a prescriptive right to carry on an offensive trade on the river-bank, and corrupt the water(*e*)

Nuisances from offensive smells and the exercise of noisome trades.—An action does not lie for the reasonable exercise of a necessary trade in a fit and convenient place, though the exercise of the trade be productive of annoyance to another. The occupier of every house comes to his house clothed with all the rights appurtenant to it, one of which, at common law, is a right to wholesome and untainted air; but the right of the owner of the house to have air unpolluted is subject to the necessities of the publick, which are superior to private rights; so that if it can be shown that publick convenience requires the exercise of a particular trade of an annoying character in a particular locality, the private right must give way to the publick good. "Take a new neighbourhood," observes Byles, J., "where houses are just beginning to be built on the outskirts of London, and you find a clump of bricks erected there for disposing of some brick-earth that lies there,—a temporary measure to get rid of the clay,—and one or two people in the neighbourhood are annoyed, it would probably be said that that was a reasonable and proper place in which to carry on the business, for it must be carried on somewhere; and, in this country, to find an open heath round which there is nobody living, you must go many miles from London"(*f*).

If the trade is proved to be a noisome trade, and the locality of it not to be a convenient and proper locality for the exercise of such a trade, the defendant may, nevertheless, establish a prescriptive right to the exercise of the trade on the particular spot by showing that he has exercised it without molestation or interruption for the period of twenty years(*g*). "It used to be thought, that if a man knew there was a nuisance, and went and lived near it, he could not recover, because, it was said, it is he that goes to the nuisance, and not the nuisance to him. That, however, is not the law now"(*h*). But if no prescriptive right be established, and the locality is not a fit and proper locality for such a trade, the exercise of it is a nuisance, though it be a necessary trade. "A tan-house is

(*d*) *Murgatroyd v. Robinson*, 7 Ell. & Bl. 801; 26 Law, J., Q. B. 283.

(*e*) Ante, p. 43. *Bealey v. Shaw*, 6 East, 214.

(*f*) *Hole v. Barlow*, 4 C. B., N. S. 334;

27 Law, J., C. P. 207.

(*g*) *Elliotson v. Feetham*, 2 Bing. N. C.

134. *Bliss v. Hall*, 5 So. 504.

(*h*) Byles, J., 4 C. B., N. S. 336; 27 Law, J., C. P. 208.

necessary, for all men wear shoes; and, nevertheless, it may be pulled down, if it be erected to the nuisance of another; in like manner of a glass-house; and they ought to be erected in places convenient for them" (i).

Noisy nuisances.—Quietness and freedom from noise are indispensable to the full and free enjoyment of a dwelling-house. Every person, therefore, who blows a horn in the night-time in the neighbourhood of a dwelling-house, so as to disturb the repose of the inmates, is guilty of a nuisance, and is responsible in damages, unless he can show some justification for the making of the noise (k). Every person, also, who erects a mill or a smith's forge, or any noisy machine, or carries on any noisy trade or manufacture adjoining a dwelling-house, whereby the comfort and quiet of the house are destroyed, and the rest of the inmates disturbed at night, is guilty of a nuisance, and is liable to an action for damages, unless he can show that he has gained a prescriptive right to make the noise by twenty years' user and enjoyment (l).

Nuisances resulting from the collection of crowds.—It is an old principle of law, that if a person collects together a crowd of people to the annoyance of his neighbours, that is a nuisance for which he is answerable. Therefore, where the defendant was in the habit of inviting persons into his own grounds to shoot pigeons, and the effect of that was that idle persons collected near the spot, trod down the grass of the neighbouring meadows, destroyed the fences, and created alarm and disturbance amongst the women and children in the adjoining thoroughfares, it was held that the defendant was guilty of a nuisance (m). So, where the defendant descended in a balloon into the plaintiff's garden, and a number of persons rushed into the garden to render help and gratify their curiosity, and destroyed the plaintiff's hedges and crops, it was held that the defendant who had set the balloon in motion and caused the mischief was responsible for the injury (n).

Nuisances and injuries from spring-guns, man-traps, dog-spears, engines, and machines placed on land for the protection of game, or the punishment of trespassers.—By 7 & 8 Geo. 4, c. 18, it is enacted, that any person who shall cause to be placed (s. 1), or shall knowingly and wilfully continue (s. 3) any spring-gun, man-trap, or other engine calculated to destroy human life, or inflict grievous bodily harm, with the intent that the same, or whereby the same, may destroy or inflict grievous bodily harm upon a trespasser, or other person coming in contact therewith,

(i) Hide, C. J., *Jones v. Powell*, Palm. 539.

(k) *Rex v. Smith*, 2 Str. 703.

(l) *Bradley v. Gill*, 1 Lutw. 69. *El-Holston v. Feetham*, 2 Bing. N. C. 134; 2

Sc. 174. Ante, p. 39. *Sollau v. De Held*, 2 Sim. N. S. 133.

(m) *Rex v. Moore*, 3 B. & Ad. 188.

(n) *Guille v. Swan*, 19 Johns. (U. S. R.), 381.

of coke, within fifteen yards from any part of the said carriage-way or cart-way, unless the same shall be within some house or other building, or behind some wall or fence sufficient to screen the same from such carriage-way or cart-way. Penalties are imposed upon persons offending against the statute for each and every day that any such pit, shaft, wind-mill, steam-engine, gin, machine, or fire, shall be permitted to continue contrary to the provisions of the act.

Penalties are also imposed (s. 72) upon persons playing at games on highways, to the annoyance of the passengers, or making fires, or letting off fireworks, pistols, or guns within fifty feet of the centre of the way, or laying things on the highway, to the interruption of persons travelling thereon, or suffering filth or any offensive matter to flow upon the highway from the adjoining premises, or in any way wilfully obstructing the passage of the highway. Provision is also made (s. 73) for the removal and abatement of all nuisances upon the highway.

Dangerous excavations adjoining highways.—As persons are prohibited from sinking pits or shafts within the distance of twenty-five yards from any part of a carriage-way or cart-way, being a highway, it follows that any person who has sustained injury from the doing of the prohibited act is entitled to an action to recover compensation in damages from the wrong-doer; and it is no answer to such an action to show that he had deviated from the highway, and was a trespasser upon the adjoining land at the time he sustained the injury; but when the excavation is made beyond the distance of twenty-five yards from the carriage-way, and does not immediately adjoin any footpath or publick place of passage where all persons have a right to go, and there is no obligation imposed upon the landowner on whose land the excavation has been made to fence it off, and the person falling into it would be a trespasser upon the intervening land before he reached the excavation, no action would be maintainable by the injured party (y).

Where the occupier of a dangerous area adjoining a highway set up as a defence that the premises had been exactly in the same condition as far back as could be remembered, and many years before he took possession of them (z), Lord Ellenborough held that, however long the premises might have been in a dangerous state, the defendant, as soon as he took possession of them, was bound to guard against the danger to which the publick had been before exposed; and that he was liable for the consequences of having neglected to do so, in the same manner as if he himself had origi-

(y) *Hardcastle v. South York, &c. Rail. Co.*, 4 H. & N. 74; 28 Law, J., Exch. 139. *Blyth v. Topham*, Cro. Jac. 159. *Barnes v. Ward*, ante, p. 81.

(z) *Barnes v. Ward*, 9 C. B. 420; 19 Law, J., C. P. 290. *Jarvis v. Dean*, 11 Moore, 354.

nated the nuisance; that the area belonged to the house, and the law cast upon the occupier the duty of rendering it secure (a).

Obstructions in publick thoroughfares.—If one man wilfully interferes with the free right of passage of another along a publick highway, there is an injury to a right, and an action for damages is maintainable. And whenever a private injury has been sustained from an unauthorized obstruction in a publick thoroughfare, the injured party is entitled to compensation in damages. If one person wilfully and intentionally ruins his carriage before another person's carriage in a publick thoroughfare, stopping when he stops, and going a-head of him when he goes on, and crossing his path, so as to prevent him from having the free and uninterrupted use of the highway, and oblige him to pull up or slacken speed, for fear of a collision, the person so obstructing the publick thoroughfare will be guilty of a nuisance, and responsible in damages to the party whose free right of passage has been wilfully and unlawfully obstructed. There is, in such a case, an injury to a right, and substantial damages are recoverable. Where, therefore, an omnibus company headed and tailed the omnibus of a private individual with the company's omnibuses, and obstructed the highway with their vehicles, so as to create a nuisance, and interrupt the free passage of the thoroughfare, it was held that the omnibus company was responsible in damages to the private omnibus proprietor, who had been wilfully delayed and impeded in the exercise of his right to pass along the publick highway (b).

If the occupier of a house or building adjoining a highway directs certain repairs to be done to his house, and it becomes necessary to excavate the earth, and remove stone, timber, and materials from the premises, and the excavated earth and materials are placed in the high road, in front of the house, with the knowledge and sanction of the occupier of the house, the latter will be responsible for the obstruction, although it was placed there by the servants or workmen of a builder or contractor. If, seeing the obstruction and the danger of it, and having control over everybody working upon his own land, and bringing materials out of his own house, he does *nothing* to prevent or abate the nuisance, if he silently acquiesces in the conversion of the highway into a place of deposit for materials brought from his own premises, there will be evidence to go to a jury of the things having been placed in the highway by his authority (c).

So, by the civil law, every occupier of a house, whether he was the

(a) *Coupland v. Hardingham*, 3 Campb. 398.

(b) *Green v. Lond. Gen. Omnib. Co.* 35. Law, T. R., 8th Week Rep. 1860.

(c) *Burgess v. Gray*, 1 C. B. 591. *Bush v. Steinman*, 1 B. & P. 408. *Ellis v. Sheff. Gas Co.* 23 Law, J., Q. B. 42; post, s. 2.

proprietor of it or a lessee, was held liable for damage caused by anything being thrown out of the house, or the premises belonging to it, into a street, or publick thoroughfare, or any other place. And the occupier was held responsible for the damage, if the thing was done by any of his family or domestics in his absence or without his knowledge (d).

Nuisances from obstructions in navigable rivers.—The right of soil in arms of the sea and publick navigable rivers, which is *primâ facie* vested in the crown, independently of any ownership in the adjoining lands, must in all cases be considered as subject to the publick right of passage, however acquired; and any grantee of the crown must, of course, take subject to such right. If, therefore, he places any obstruction in the bed of the river, which deprives another of his right of free passage along it, he is liable to an action for the private and particular injury to the individual (e). But if the obstruction has not deprived any particular individual of his right of passage along the stream, or caused him any personal damage different from and independent of that which is sustained by the rest of the publick, an action for damages is not maintainable, but the publick remedy, by way of indictment, must be pursued (f). If oysters and oyster-brood are so placed in a navigable creek or river, and in such masses as unlawfully to diminish the depth of water, and obstruct the navigation, a shipowner or shipmaster is not by reason thereof justified in negligently or wilfully running his vessel upon the oyster-beds, and destroying the oysters, if there was abundance of room and water for the vessel to have passed up the river without going upon the beds (g).

Obstructions in navigable rivers from sunken vessels—Duty of the owner of the vessel to take precautions to prevent accidents.—The owner of a ship, sunk in a navigable river by accident, without his default or misconduct, is not bound to remove the nuisance, if the vessel is totally submerged, and he has no longer the possession of it; but if he has possession of the vessel, and exercises the dominion and control of an owner over it, he is bound to take all reasonable and proper care to prevent accidents to other vessels navigating the river, and must remove the obstruction with all reasonable diligence. This duty attaches to the ownership of the vessel for the time being, and will be transferred to a purchaser of the sunken vessel, who takes the wreck into his possession, and under his management and control (h).

Injuries to land from the erection of groins, sea-walls, and defences, causing the sea to make inroads on a neighbour's land.—Every proprietor of land

(d) Domat. Droit. Civ. liv. 2, tit. 8, s. 1. Pandect, lib. 9, tit. 3. Instit. lib. 4, tit. 5, s. 1.

(e) *Rose v. Groves*, 6 Sc. N. B. 659; post, s. 2.

(f) *Dimes v. Petley*, 15 Q. B. 283.

(g) *Mayor of Colchester v. Brooke*, 7 Q. B. 377.

(h) *White v. Crisp*, 10 Exch. 312; 23 Law, J., Exch. 317.

exposed to the inroads of the sea may erect on his own land groins, or other reasonable defences, for the protection of his land from the inroads of the sea, although, by so doing, he may cause the sea to flow with greater violence against the land of his neighbour, and render it necessary for the latter to protect himself by the erection of similar sea-defences. "Each landowner has a right to protect himself, but not to be protected by others, against the common enemy" (i).

Nuisances resulting from the negligent overloading of the floors of warehouses and buildings.—If one man overloads the floor of a warehouse with merchandise, so that the floor breaks and crushes the goods of another man in the floor underneath, the latter is entitled to an action for damages against the former. If the floor is ruinous, the occupier must take good care that he does not put upon such ruinous floor more than it can well bear; and if it will not bear anything, he ought not to put anything upon it to the prejudice of another. Where the defendant, who was the lessee and occupier of a warehouse, underlet a cellar beneath the warehouse to the plaintiff, and the defendant so over-burthened the floor of the warehouse with merchandise, that the floor gave way, and crushed the plaintiff's wine in the cellar, it was held that the defendant was responsible for the injury, and that it was no answer to the action to say that the floor was ruinous, and that the defendant was not bound to repair it; "for he who takes a ruinous house ought to mind well what weight he put into it at his peril, that it be not so much that another shall take any damage by it. But if the floor had fallen of itself, without any weight put upon it, or by the default only of the posts in the cellar which support it, with which the defendant had nothing to do, there the defendant shall be excused" (k).

Nuisances and injuries from the non-repair of ruinous houses—Liability of the landlord and occupier.—As between the landlord and occupier of a house, or the landlord and tenant, there is no obligation upon the landlord to keep the house in repair, in the absence of an express contract to that effect. If, therefore, the chimney of a house demised to a tenant becomes ruinous, and falls through the roof of the house, and injures the furniture and family of the tenant, the latter has no remedy against his landlord for the injury (l). But the landlord is responsible to the publick, and to the occupiers and proprietors of the adjoining property, if he demises houses which are in a ruinous state, and dangerous to the neighbourhood, either from original faulty construction, or from want of proper

(i) *Rex v. Commissioners, &c.* 8 B. & C. 860.

(l) *Gott v. Gandy*, 2 El. & Bl. 847; 23 Law, J., Q. B. 1.

(k) *Edwards v. Halinder*, Poph. 16.

and timely repair (*m*). But if the houses or buildings are in good repair and condition at the time of the demise, and subsequently become ruinous and dangerous to the neighbourhood, the landlord is not, it seems, responsible for the nuisance, unless he has taken upon himself the burthen of repairing and maintaining the premises during the existence of the lease (*n*), or has renewed the lease after the houses had become ruinous and in danger of falling (ante, pp. 76, 77). The occupier is also responsible for the nuisance; and it is no answer for him to say that he is a mere tenant-at-will or upon sufferance, or has only a temporary or precarious interest in the premises, and is under no obligation to maintain and repair them; for if he chooses to take the benefit of the occupation of premises, he must take them with the accompanying burthen of preventing them from becoming a source of danger to others.

Thus, where the defendant was indicted for not repairing a ruinous house abutting upon a highway, and the indictment charged that the house was likely to fall down, and that the defendant occupied it, and ought to repair it, and the jury found that the house was ruinous and likely to fall, and that the defendant occupied it, but was only tenant-at-will, the Court held that he was nevertheless answerable to the publick for its dangerous condition (*o*). But the liability of a mere tenant-at-will, in this respect, ought in reason to be confined to cases where he knew or ought to have known that the house was in a dangerous state, and chose to become and continue the occupier of it, with knowledge of its dangerous condition. All that the occupier is bound to do, in any case, is to shore up the building so as to prevent it from falling. He is not bound, as between himself and the publick or the neighbours, to put it into a state of repair.

By the civil law, wherever anything hung out from a house happened to fall and injure another, the occupier of the house was held responsible in damages for the injury; but if tiles fell from the roof from the effect of a storm, and the roof was in good repair, the occupier was not answerable for the accident. If the roof was out of repair, then the person bound to keep it in repair was guilty of a breach of duty, and was answerable for the damage to the party injured (*p*).

Negligence in pulling down houses where one house adjoins and rests against another—Negligent excavations near the foundations of buildings.—It is the duty of all persons to use due care and skill, and take due, reasonable,

(*m*) Ante, p. 77. *Rez v. Pedly*, 1 Ad. & E. 822.

(*o*) *Reg. v. Watts*, 1 Salk. 357.

(*n*) *Payne v. Rogers*, 2 H. Bl. 349. *Leslie v. Pounds*, 4 Taunt. 648.

(*p*) Domat. liv. 2, tit. 8, ss. 1, 10, 11.

and proper precautions in pulling down houses and walls which rest against, or are in contact with, an adjoining house or wall; and if an injury is sustained from a neglect to exercise such care, skill, and precaution, a wrong is done, and the wrong-doer is responsible for the damage (q). If a man negligently and carelessly excavates his own land close to the foundations of his neighbour's house without giving the latter any warning, or giving him an opportunity of shoring up or protecting his house, the careless excavator will be responsible for the damage he occasions (r). But the duty of taking care does not arise where the excavator is ignorant of the existence of the thing which may be injured by the want of care. Thus, where a landowner excavated in his own land close to a cellar of his neighbour's, not knowing of the existence of the cellar, it was held that he could not be made responsible for an injury to the cellar (s).

Nuisances and injuries from ruinous party-walls.—If injury results from the non-repair of a party-wall, of which the plaintiff and defendant are tenants in common, and there has been a neglect of the duty to repair on the part of the plaintiff, as well as on the part of the defendant, the plaintiff cannot recover damages (t).

In Fitzherbert's Abridgement we read, "that where there are three tenants in common, or joint tenants of a mill or house which falls to decay, and one will repair, but the other will not repair the same, he shall have a writ *de reparatione faciendā* against them, and the writ is such, &c. And so, if a man have a house adjoining to my house, and he suffer his house to lie in decay to the annoyance of my house, I shall have a writ against him to repair his house in such form. 'Command A that, &c. he cause to be repaired his certain house in N, which threatens destruction to the nuisance of the freehold of B, in the same town, which he ought and hath been used to repair'" (u).

Nuisances and injuries from ruinous and insecure fences, hedges, and gates.—When lands are burthened by grant or prescription with the servitude of maintaining a wall, fence, hedge, or gate for the benefit of the adjoining land (ante, pp. 46, 47), the occupier of the servient tenement will, as we have seen, be responsible in damages to the occupier of the dominant tenement if he allows the wall, fence, &c., to be ruinous and defective, so that cattle and sheep break through the fence and stray from

(q) *Trower v. Chadwick*, 3 Sc. 722; 3 Bing. N. C. 334; 8 Sc. 19. *Walters v. Pfeil*, 1 M. & M. 385. *Davis v. Lond. & Bl. Rail. Co.* 2 Sc. N. R. 74; 1 M. & Gr. 799. And see ante, pp. 7-9, 35, 36, 45, 46.

(r) *Dodd v. Holme*, 1 Ad. & E. 506. *Bradbee v. Christ's Hosp.* 4 M. & Gr. 758.

Massey v. Goyder, 4 C. & P. 165. *Jones v. Bird*, 5 B. & Ald. 637.

(s) *Chadwick v. Trower*, 8 Sc. 20; 6 Bing. N. C. 1.

(t) *Chauntler v. Robinson*, 4 Exch. 103.

(u) *Fitz. Nat. Brev.* 127; Co. Litt. 58b. This writ was abolished by 3 & 4 Wm. 4, c. 27, s. 86.

one tenement to the other. The occupier of the servient tenement is entitled to the benefit of his field for turning in other people's cattle as well as his own stock; and if he takes in another man's horse, and the horse gets through a ruinous fence, which the adjoining occupier ought to have repaired, and falls into a pit on the adjoining land and is killed, the occupier who ought to have repaired the fence is, as we have seen, responsible for the full value of the horse to the occupier of the field from which the horse strayed (*x*).

Neglect of the statutory servitude imposed upon railway companies of keeping up and maintaining fences for the benefit of the adjoining landowners and occupiers.—The General Railway Act, 8 & 9 Vict. c. 20, which enacts (s. 68) that railway companies shall make and maintain fences for separating the land taken for the use of the railway from the adjoining lands, and preventing the cattle of the owners or occupiers thereof from straying thereout by reason of the railway, does not impose upon railway companies any greater liability in respect of the maintenance of fences than is imposed by the common law upon occupiers who are bound to maintain and repair fences for the benefit of the adjoining occupiers (*y*). Railway companies, therefore, are not bound to fence against trespassers upon the adjoining lands, and persons who are neither owners nor occupiers thereof. Where the plaintiff's sheep escaped from his own land into the adjoining close, and were trespassing there, and then passed on to the defendant's railway, from defect of fences, and were killed by a train, it was held that the defendants were not responsible for the injury; for the plaintiff was not the owner or occupier of land adjoining the railway, and the company, consequently, was not bound to fence against him (*z*). And where cattle strayed into a highroad adjoining a railway, and through defect of fences got upon the railway and were killed, it was held that the company was not responsible for the injury, as the cattle were trespassers on the highway, and the owners of the cattle were not occupying the road with their cattle at the time they strayed from the road on to the railway (*a*).

But if cattle are passing along a highway under the care of the servants of the owner, the latter is lawfully using the way, and is deemed to be a temporary occupier of the highway, and, consequently, an occupier of land adjoining the railway within the words of the statute, so as to render it incumbent upon the company to maintain fences for the safety of his cattle so traversing the highway. Where a colt strayed from a field on

(*x*) *Rooth v. Wilson*, 1 B. & Ald. 59; ante, p. 65.

(*y*) *Manch. Sheff. & Linc. Rail. Co. v. Wallis*, 14 C. B. 224; 23 Law, J., C. P. 85; ante, p. 46.

(*z*) *Ricketts v. East & West Ind. &c.* 12 C. B. 174.

(*a*) *Manch. Sheff. & Linc. Rail. Co. v. Wallis*, 14 C. B. 224; 23 Law, J., C. P. 85.

to a public road, and the servants of the owner of the colt went in pursuit of it, headed it, and drove it back along the highway towards the field from which it had escaped, and the colt turned through an open gate into a coal-yard abutting upon a railway, and not fenced therefrom, and passed on to the railway, and was killed by a passing train, it was held that the railway company was responsible for the accident, as the owner's servants were in the act of driving the colt home at the time it escaped through the open gate, and the colt was not then trespassing upon the highway (*b*). But there is no duty imposed by statute or by the common law upon railway companies to fence off from their railway their own yards and inclosures around their stations; and if cattle left in their yards stray therefrom, from the want of such fences, and get on the railway, and losses arise, the company is not responsible for such losses, unless it be shown that the cattle were under the care of the company's servants, and that they had failed to take proper means to prevent the cattle from straying (*c*).

Nuisances and injuries from the negligent use and management of railway stations—Insufficient lights and guards.—It is not sufficient for the lights at the station of a railway company to be quite sufficient for the company and their own servants, who know the premises, and are perfectly conversant with the approaches. It must be enough to guide and direct strangers who are wholly unacquainted with the locality. A degree of light which will enable a person who is familiar with a place to see all about him, and understand where he is, may not be sufficient to enable a person who is unacquainted with, or has an imperfect knowledge of, the locality, to find his way or to guard against danger. "Railway companies are to light their railway," observes Maule, J., "not for their own servants alone, but for persons who have never been there before, and who may be in a great hurry to reach the train; and they are to light it so as to enable them to see their way. . . If they choose to allow people to cross the line at the last moment, they should have a person to point out to passengers who are in a hurry the right course for them to take; or if they have not a man, they might have a board pointing to the direction; for they are bound to do what is needful for the safety of their passengers." Where, therefore, the plaintiff, being on his return-journey with a return-ticket, and, having got to the wrong side of the railway, crossed the line to get to the return-train at a place where there was no proper crossing, there being no person to point out to him the proper crossing, and fell over a switch-handle, which he could not see for want of

(*b*) *Mid. Rail. Co. v. Daykin*, 17 C. B. 129.

(*c*) *Roberts v. Gt. West. Rail. Co.* 4 C. B. 506; 27 Law, J., C. P. 266.

light, it was held that the company was responsible for the injury he sustained (*d*).

But, in order to make out a case of negligence, or of neglect of duty on the part of the company, it must be shown that they used or managed their property in such a way as to render it likely to be a source of danger to their passengers, and persons lawfully using the station (*e*). It is not enough to show that they have doors opening upon the platform, and steps leading from those doors, and that the plaintiff tumbled down the steps, without showing that the steps are more than ordinarily dangerous (*f*). Where rules are promulgated by a railway company for the management of a station, and injuries are caused by the servants of the company endeavouring to carry these rules into effect, the company is responsible in damages, unless the injured party brought the mischief upon himself by his own negligence (*g*).

Nuisances and injuries from ruinous and insecure railway-bridges, viaducts, and embankments.—Every railway company in the actual possession and occupation of its line of railway is responsible for the maintenance and preservation in a good state of repair of all its bridges, viaducts, and embankments, so that if any injuries are sustained either by persons travelling along a highway under a bridge or viaduct, or by passengers travelling along the line from the ruinous and insecure state of such bridge or viaduct, the railway company will be responsible for the injury, whether it arose from their own neglect in not providing needful reparations, or from original faulty construction of the fabric by their engineer or contractor (*h*). But if a railway embankment has been injured by some extraordinary flood, and the rails give way, and the passengers are injured without any neglect or default on the part of the company, the company is not responsible for the injuries that may be sustained by the passengers (*i*).

Injuries from the neglect of railway companies to erect and maintain bridges over highways.—By 8 & 9 Vict. c. 20, s. 46, it is further enacted, that if the line of railway cross any turnpike road, or public highway, then (except where otherwise provided by the special act) either such road shall be carried over the railway, or the railway shall be carried over such road, by means of a bridge, to be maintained at the expense of the

(*d*) *Martin v. Gr. Northern Rail. Co.* 16 C. B. 180; 24 Law, J., C. P. 209. *Birket v. Whitehaven Junc.* 33 Law, T. R. 226.

(*e*) *Burgess v. Gr. West.* 32 Law, T. R. 76.

(*f*) *Toomey v. Lond. & Br. Rail. Co.* 3 C. B., N. S. 146; 27 Law, J., C. P. 39. *Cornman v. E. C. R. Co.* 5 Jur. N. S. 657.

(*g*) *Vose v. Lanc. & York Rail. Co.* 2 H. & N. 728; 27 Law, J., Exch. 249; post, ch. 4.

(*h*) Ante, pp. 81, 82. *Chester v. Holyhead Rail. Co.* 2 Exch. 251.

(*i*) *Withers v. North Kent Rail. Co.* 27 Law, J., Exch. 417.

company; but it is provided that, with the consent of two or more justices in petty sessions, it shall be lawful for the company to carry the railway across any highway other than a publick carriage-road on the level.

Of injuries from the negligent management of railway-gates placed across publick carriage-roads.—When a railway crosses any turnpike-road, or publick carriage-road on a level, the company must (8 & 9 Vict. c. 20, s. 47), unless otherwise authorized by their special act, erect and at all times maintain good and sufficient gates across such road, on each side of the railway where the same shall communicate therewith, and employ proper persons to open and shut such gates, and keep them constantly closed across the road on both sides of the railway, except during the time when horses, cattle, carts, or carriages passing along the road shall have to cross the railway; and the gates must be of such dimensions and so constructed as, when closed, to fence in the railway, and prevent cattle or horses passing along the road from entering upon the railway.

Wherever this section of the statute, or one of a similar import, is in force, it imposes upon the railway company governed by it the duty of closing the gates across publick carriage-roads carefully against everything passing lawfully or unlawfully along the highroad. Where, therefore, the plaintiff's horses strayed from his field into the highroad, and passed from thence through an open gate, and got upon a railway, and were killed by a passing train, it was held that the railway company was responsible for the loss, as the obligation to keep the gates closed imposed upon them the duty of closing them carefully against everything passing lawfully or unlawfully along the highroad (*k*).

Negligent management of accommodation gates.—By 8 & 9 Vict. c. 20, s. 75, it is further enacted, that if any person omit to shut and fasten any gate set up at either side of the railway for the accommodation of the owners or occupiers of the adjoining lands, as soon as he, and the carriage, cattle, or other animals under his care have passed through the same, he shall forfeit for every such offence a sum not exceeding forty shillings.

No duty is imposed upon railway companies to watch and keep closed gates put up for the accommodation of an adjoining landed proprietor whose land extends along both sides of a railway. And where a railway company provides the adjoining landowners with keys for the gates, the company is not responsible for the destruction of cattle straying upon the line, in consequence of the gates being left open (*l*) or insecurely fastened. And if the plaintiff had the means of making the gate secure, and neglected them, his own neglect in the matter will be a bar to the

(*k*) *Fawcett v. York & North Mid. Rail. Co.* 16 Q. B. 618.

(*l*) *Ellis v. Lond. & S. W. R. Co.* 2 H. & N. 420; 26 Law, J., Exch. 340.

maintenance of an action against the railway company for the injury he has thereby sustained (*m*).

Negligent management of canals.—Every canal company, so long as it keeps its canal open for the publick use of all who may choose to navigate it, is bound to take reasonable care that they may navigate it without danger to their lives or property (*n*). Every canal company is bound also to take all reasonable and proper precautions for the protection of the publick, where the canal intersects publick thoroughfares. In such cases there is a common law obligation on the company to make and maintain sufficient bridges, with proper rails and lights, such as all persons passing along the highway can safely use. When the highroad traverses the canal by a swing-bridge, and the bridge is opened for the passage of boats and vessels, the company is bound to provide sufficient lights, or persons to watch and warn passengers, or to have some apparatus attached to the bridge itself, to protect passengers when the bridge is open, and prevent them from falling into the water (*o*). But if the canal has been demised to a lessee, who is in the actual possession and occupation of it, and who receives the toll for the use of it, it is not then the duty of the proprietors of the canal to maintain and repair the canal, unless the particular statute under which they are incorporated expressly imposes that duty upon them (*p*).

Negligent management of docks.—A duty is cast upon trustees and commissioners who have the receipt of the tolls, and the possession and management of a dock vested in them, to forbear from keeping the dock open for publick use, when they know it cannot be navigated or used without danger, whether the tolls are received by them for their own use, or in a fiduciary character; and if they keep the dock open, and allow the danger to continue, and invite vessels into peril, they will be personally responsible for any damage that may be sustained (*q*).

Injuries to servants from the dangerous state of the premises on which they are employed.—*Dangers known to the master, but unknown and undisclosed to the servant.*—Every master who employs servants and workmen to work upon his land, house, or premises, is bound to take all reasonable precautions for their safety; and if hidden and secret dangers exist upon his premises, known to him and unknown to his workmen, it is his duty to disclose them to the latter, that they may take precautions for

(*m*) *Haigh v. Lond. & North West. Rail. Co.*, 8th Week Rep., Q. B. 6.

(*n*) *Lanc. Canal Co. v. Parnaby*, 11 Ad. & E. 243. *Gibbs v. Trustees Liv. Dock*, 27 Law, J., Exch. 321; 3 H. & N. 164.

(*o*) *Manley v. St. Hel. Can. & Rail Co.* 2 H. & N. 840; 27 Law, J., Exch. 164.

(*p*) *Walker v. Goe*, 4 Exch. 350; 27

Law, J., Exch. 427. As to the common law-duty of the actual occupier to keep his premises in such a state as not to be a source of annoyance to his neighbours, see ante, p. 76.

(*q*) *Gibbs v. Trust. Liv. Dock*, 27 Law, J., Exch. 321; 3 H. & N. 164.

their safety. If a master was to order his servant to take a lighted candle amongst packages known by him, but not known by the servant, to contain gunpowder, the master would be responsible for any injury sustained by the latter from the unknown danger and unexpected risk to which he had been exposed, but not if the servant accepted of the employment knowing of the risk he ran.

If a railway company employs workmen upon its tunnels, sidings, or stations, it is guilty of negligence if it conducts its traffic so as to expose the workmen to unexpected and unforeseen dangers, which they had no means of guarding against. If the company uses a siding adjoining a station for mending its carriages and wagons, the workman has a right to expect that he can continue his work in safety; and if the business of the company at the station is so conducted as to expose him to unknown and unforeseen dangers, which he had no means of guarding against, the company will be responsible for any injury he sustains therefrom (r).

Exemption of the master from liability when the dangerous state of the premises is known to the servant.—But the master is not responsible for the dangerous state of his premises, if those dangers are known to the servant, and the latter has accepted the employment knowing of the attendant risks, and having an opportunity of guarding against them by his own vigilance and care. Where the plaintiff alleged that he had been hired by the defendant to perform at the defendant's theatre, and that on part of the stage there was a hole in the floor, along which the plaintiff had to pass in the discharge of his duty as a performer, and that it was the duty of the defendant to light the floor sufficiently, so as to prevent accidents to those who passed along it, it was held that no such duty was cast upon the defendant by the common law or by the contract. "A person," observes Erle, J., "must make his own choice whether he will accept employment upon premises in this condition; and if he do accept such employment, he must also make his own choice whether he will pass along the floor in the dark, or carry a light. If he sustain an injury in consequence of the premises not being lighted, he has no right of action against the master, who has not contracted that the floor shall be lighted." If the servant wishes the premises to be kept in any particular state with respect to lighting and fencing, he must provide therefor by express contract (s).

If the workman is employed in the use of dangerous machinery furnished by the employer, and is, or professes to be, acquainted with the use of the machinery, and the care requisite to be taken to guard against

(r) *Vose v. Lanc. & York. Rail. Co.* 2 H. & N. 728; 27 Law, J., Exch. 249. *Williams v. O'lough*, 3 H. & N. 258; 27

Law, J., Exch. 325.

(s) *Seymour v. Maddox*, 16 Q. B. 332.

accident, and, notwithstanding this, sustains injury from his own want of care and caution in the use of it, he has, of course, no ground of action against the employer (*t*).

Injuries to workmen from defective hoisting-tackle in mines, and insecure scaffolding and ladders.—It has been held, in a Scotch case in the House of Lords, that the owner of a mine is bound to exercise ordinary care and vigilance to keep the shaft of the mine in a safe state, and the machinery for lifting people from the mine, and lowering them into it, in a secure and sufficient state and condition (*u*). And it is in all cases the master's duty to be careful that his workman is not induced to work under the notion that the tackle, scaffolding, or rope with which he works is secure, when he knows, or has reasonable ground for believing, that it is unsafe and dangerous. If he interferes in the conduct and management of the work himself, he is bound to select sound and safe materials; and if he knowingly allows rotten timber, rotten poles, or rotten ropes to be used in the construction of a scaffold, and injury is sustained therefrom by his servants or workmen, he will be responsible in damages (*x*). But if he does not in any way interfere himself, and employs a competent foreman to superintend the work, and select the materials, and the foreman selects unsound and unsafe materials, which cause injury to the workmen working under the foreman's directions, the master is not responsible, as the default is not in him, but in the foreman and fellow-servant of the injured workman, and the case then ranges itself with that class of cases where it has been holden that the master is not responsible for injuries to one fellow-servant caused by the negligence of another fellow-servant in his employ (*y*).

Injuries to guests from the dangerous state of the premises of their host.—A man who invites and receives visitors at his house is under the same obligation and liability as regards them, in respect of unusual and unsuspected dangers on his premises, as he is towards his own servants and members of his family, and is not responsible for injuries arising from doors badly hung, and which are dangerous and unfit to be opened, unless he was himself aware of the dangerous state of the door, and the guest was wholly ignorant of it (*z*). If the dangers are patent and visible, the visitor who comes to, and is received within, the house must share those dangers in common with the other members of the family.

(*t*) *Dynen v. Leach*, 26 Law, J., Exch. 221. *Barton's Hill Coal Co. v. Reid*, 3 Macq. 294.

(*u*) *Brydon v. Stewart*, 2 Macq. 34.

(*x*) *Roberts v. Smith*, 26 Law, J., Exch. 319; 2 Hurl. & N. 218. *Senior v. Ward*, 28 Law, J., Q. B.

(*y*) *Wigmore v. Jay*, 5 Exch. 358; post, ch. 4. *Williams v. Olough*, 3 H. & N. 258; 27 Law, J., Exch. 325. *Griffiths v. Gidlow*, ib. 404. *Farwell v. Boston, &c. Rail. Co.* 3 Macq. 316.

(*z*) *Southcote v. Stanley*, 1 H. & N. 247.

Exemption of the defendant from all legal liability where the injury has been occasioned by the negligence of the plaintiff himself.—If the negligence of the plaintiff himself or of his servants has been the proximate cause of the injury of which he complains, he has no ground of action (a). If, therefore, the plaintiff does not take due and proper care to keep his cattle within bounds; if he or his servants leave gates open which they ought to have closed; or if he allows cattle to be driven across a railway by little boys who are unable or unlikely to exercise proper care and forethought, and in consequence thereof cattle stray on the line and get killed, he cannot recover compensation from the railway company for the loss (b). Where a railway crossed an occupation-way for horses and cattle, along which there was also a publick footpath, and the company, not being aware of the publick footpath, never applied for the consent of justices for crossing the cattle-way on a level, but made their railway, and erected lofty gates on each side of the railway where it crossed the occupation-way, and gave keys of the gates to each of the adjoining occupiers who were entitled to use the occupation-road, and the plaintiff's servant, who was in the habit of driving the plaintiff's cows daily backwards and forwards across the line, received a key from the company, and lost it, and after that fastened the gate by thrusting a piece of wood through the staple, and the gate being left open, two colts of the plaintiff's strayed from his field along the occupation-way, through the open gate, upon the line of railway, and were killed by a passing train, it was held to be a question for the jury whether the negligence of the plaintiff had contributed to the accident; and they being of opinion that it had, it was held that the defendant was entitled to a verdict (c).

Where the plaintiff's right to recover damages is not defeated by his being a trespasser upon the land of the defendant.—If the plaintiff has sustained injury from man-traps or spring-guns placed on the defendant's land, or from falling into an unfenced and unguarded pit or well sunk within twenty-five yards of any publick carriage-way, it is no answer to the plaintiff's claim for damages to say that he was trespassing on the defendant's land, and that the injury was caused by his own misconduct (ante, pp. 81, 82). If the defendant has, by putting strong-smelling meats into traps on his land, tempted the plaintiff's dogs or cats to the traps to their destruction, it is no answer to say that the animals were trespassing on the defendant's land at the time they came to grief (ante, pp. 79, 80).

(a) Post, ch. 9.

(b) *Haigh v. Lond. & North West. Rail. Co.* 8th Week Rep. 6.(c) *Ellis v. Lond. & S. W. Rail. Co.* 2 H. & N. 429; 26 Law, J., Exch. 349.

If the defendant makes a path to his house, and places unseen and unexpected dangers in or closely adjoining to the path, it is no answer to injured parties claiming compensation to say that they had no business to come upon the land (ante, pp. 81, 82). So, if the defendant leaves a vault or area unfenced and unguarded, so close to a street or public highway as to be dangerous to persons passing along the highway in the dark, or in foggy weather, it is no answer to a claim for damages by persons who have inadvertently fallen into the vault or area whilst endeavouring to keep to the highroad, to show that there was an intervening strip of the defendant's land extending between the highway and the area, on which the plaintiff was trespassing at the time he fell into the pit (*d*). But wherever a person designedly deviates from the highway, and commits a trespass, in order to make a short cut across the defendant's land, and in so doing falls into an open, unguarded vault or cellar more than twenty-five yards distant from the highway (ante, p. 81), the defendant is not responsible for the injury (*e*). And whenever a person neglects to keep a proper watch upon his flocks and herds, and allows them to trespass on the highways and byeways and adjoining land, and the trespassing cattle get injured, the plaintiff, being himself in default, has no remedy for the injury he sustains (*f*).

Nuisances and injuries.—*The keeping of ferocious animals with knowledge of their dangerous propensities.*—Whoever keeps an animal accustomed to attack or bite mankind, with knowledge of its dangerous propensities, is, *prima facie*, liable to an action for damages at the suit of any person attacked or injured by the animal, without proof of any negligence or default in the securing or taking care of it. The gist of the action is the keeping the animal after knowledge of its mischievous propensities (*g*). But a man is entitled to keep a ferocious dog for the protection of his premises, and to turn it loose at night. And, therefore, where the defendant kept a fierce dog for the protection of his yard, which was tied up all day and was let loose at night, and the defendant's foreman incautiously went into the yard after it had been shut up for the night, and the dog let loose, and was thrown down and bitten by the dog, it was held that he was not entitled to an action for damages (*h*). But a man has no right to put a ferocious dog in such a situation in the way of access to his house, that a person innocently coming there for a lawful purpose in the day-time may be injured by it. And so with respect to a

(*d*) *Barnes v. Ward*, 9 C. B. 392; 19 Law, J., C. P. 196; ante, p. 81.

(*e*) *Hardcastle v. South York, &c. Ry.* Co. 4 H. & N. 74. *Stone v. Jackson*, 16

Q. B. 199; ante, p. 82.

(*f*) Ante, pp. 88, 89.

(*g*) *May v. Burdett*, 9 Q. B. 110.

(*h*) *Brock v. Copeland*, 1 Esp. 203.

footpath, though it be a private one, a man has no right to put a dog with such a length of chain, and so near that path, that he could bite a person going along it (i).

There is a difference between beasts that are *feræ naturæ*, as lions and tigers, which a man must always keep chained up at his peril, and beasts that are *mansuetæ naturæ*, and break through the ordinary tameness of their nature, such as oxen and horses. In the latter case, an action lies, if the owner has had notice of the mischievous quality of the beast. In the former case, an action lies without such notice (k). "If a man has a dog that kills sheep, the master of the dog, being ignorant of such quality, shall not be punished for this killing; but if he has notice of the quality of the dog, it is otherwise" (l).

There is no distinction between the case of the keeping of an animal which breaks through the ordinary tameness of its nature, and becomes fierce, and is known by the owner to be so, and the keeping of one which is *feræ naturæ* (m). If a dog has once bitten a man without provocation, or under circumstances which would not excite any dog of good temper to bite, and the owner has notice of it, it is his duty to chain up or muzzle the dog; and if he lets him go about, or lie at the door unmuzzled, and another person is bitten under similar circumstances, the owner of the dog will be responsible for the injury (n). It is not material whether the defendant is the owner of the dog or not. It is enough for the maintenance of the action that he keeps the dog; and the harbouring a dog about one's premises, or allowing him to be or resort there, is a sufficient keeping of the dog to support the action. As soon as a dog is known to be mischievous, it is the duty of the person on whose premises the dog stands to send him away, or cause him to be destroyed (o). The same rule of law prevails with regard to a bull which is known to have run at a man, and to be therefore dangerous (p).

Effect of putting up a notice to beware of the dog.—The putting up a notice to beware of the dog will not exempt the owner of the dog from liability to a person injured, if it appears that the latter could not read, or did not in fact read, the notice. If the plaintiff was lawfully in a way leading to the house, and was, in point of fact, ignorant of the notice, and of the danger from the dog at the time he was bitten by it, he will be entitled to compensation in damages (q).

(i) Tindal, C. J., *Sarch v. Blackburn*, 4 C. & P. 300; M. & M. 505. *Curtis v. Mills*, 5 C. & P. 489.

(k) *Rex v. Huggins*, 2 Ld. Raym. 1583. *Jenkins v. Turner*, 1 ib. 110. *Mason v. Keeling*, ib. 608.

(l) Vin. Abr. ACTIONS H. pl. 8.

(m) *Jackson v. Smithson*, 15 M. & W.

565; 15 Law, J., Exch. 311.

(n) *Charlwood v. Greig*, 3 C. & K. 48.

(o) *McKoffe v. Wood*, 5 C. & P. 2.

(p) *Blackman v. Simmons*, 3 C. & P. 138.

(q) *Sarch v. Blackburn*, M. & M. 507; ante, p. 81.

The circumstance of a dog being of a ferocious disposition, and being at large, is not sufficient to justify a man in shooting him. To justify such a course, the animal must be actually attacking the shooter at the time he uses his gun (r).

Of the keeping dogs reputed to have been bitten by a mad dog.—If, by common report, a dog has been bitten by a mad dog, "it becomes the duty of the owner of the dog so reputed to have been bitten to be very circumspect" in the keeping of it. Whether the dog said to be mad was mad or not may be mere matter of suspicion, and yet it is not enough for a defendant to say, "I did use a certain precaution. He ought to put it out of the animal's power to do further mischief" (s).

Of injuries arising from the driving of ferocious animals along a publick thoroughfare.—Where the defendant's bull, which was being driven along the publick streets, ran at a man with a red handkerchief round his neck and gored him, and the defendant, after the accident, was heard to say that the red handkerchief caused the mischief, as a bull would run at anything red, it was held that this was some evidence to go to a jury to show that the defendant knew that his bull was a dangerous animal. "As the circumstance of persons carrying red handkerchiefs is not uncommon," observes Pollock, C. B., "and it is reasonable to expect that in every publick street persons so dressed may be met with, we think it was the duty of the defendant not to suffer such an animal to be driven in the publick streets, possessing, as he did, the knowledge that if it met a person with a red garment, it was likely to run at and injure him" (t).

The following laws respecting the keeping of ferocious animals, extracted from the Roman law, are not undeserving of attention. "If an ox has a trick of pushing with his horns, and wounds any one, or causes any other damage, the master who has neglected to shut up the ox, or to give such warning that people might avoid him, shall be answerable for the harm he does."

"Those who have horses or mules which kick or bite, must either warn people of their being vicious, or take care to have them well watched, otherwise they will be made liable for the damage they may do. If a dog, who has a trick of biting, is not tied up, or if he gets loose for want of being well looked after, and wounds any one, the master of the dog will be liable to make good the damage. But if a dog or other creature bites, or does any damage only because he has been provoked, he who has given occasion to the injury that has happened shall be

(r) *Morris v. Nugent*, 7 C. & P. 572. 483.

Clark v. Webster, 1 C. & P. 104.

(s) *Ld. Kenyon, Jones v. Perry*, 1 Esp.

(t) *Hudson v. Roberts*, 6 Exch. 699;
20 Law, J., Exch. 299.

accountable for it; and if he be the person who has sustained the injury, he is alone to blame. If the beast which has done the damage has been exasperated and stirred up by another beast, the master of the latter beast shall be accountable for the damage."

"Those who have wild beasts—such as lions, tigers, bears, and others of the like kind—ought to keep them so that they can do no harm, and they are answerable for all damage that arises from their not being safely and securely kept" (u).

SECTION II.

OF THE ABATEMENT OF NUISANCES—STATUTORY REMEDIES AND PENALTIES— ACTIONS FOR DAMAGES.

Of the abatement of nuisances.—By the Nuisances Removal Act (18 & 19 Vict. c. 121), various provisions are made for the abatement of nuisances affecting the publick health. Sect. 8 of this act defines what are to be considered nuisances within its provisions, and the second part of the statute enables summary proceedings to be taken before magistrates, who are empowered to make orders for the abatement or prohibition of the nuisance (x). Various statutory powers for the abatement of publick nuisances are also given by the Smoke Prevention Act (16 & 17 Vict. c. 128), the Public Health and Local Government Act (21 & 22 Vict. c. 98), and by the Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122), ss. 69–81, which provides for the shoring up and removal of dangerous structures situate in the metropolis and its neighbourhood, and for the recovery of the expenses from the owners and occupiers thereof (y).

A man cannot, at the common law, enter upon his neighbour's land, to prevent the commission of an apprehended nuisance, but he may justify a peaceable entry for the purpose of abating and putting a stop to an existing nuisance. Thus, where the plaintiff had set up poles on his own land, in order to build a house which, when erected, would be a nuisance to the adjoining dwelling-house of the defendant, and the latter entered upon the plaintiff's land and prostrated the poles, to prevent the nuisance, it was held that the entry was wholly unjustifiable (x). But if H builds a

(u) Domat. liv. 2, tit. 8, s. 2.

(x) *Ex parte Mayor, &c. of Liverpool*,
4 Jur. N. S. 383. *Reg. v. Bateman*, 27
Law, J., M. C. 95.

(y) *Labalmondière v. Frost*, 5 Jur. N. S.

789. *Labalmondière v. Addison*, 28 Law,
J., M. C. 25.

(z) *Norris v. Baker*, 1 Roll. Rep. 308,
pl. 15.

house so near mine that it stops my lights, or shoots the water upon my house, or is in any other way a nuisance to me, I may, after previous notice and request to remove the building, enter upon the owner's soil and pull it down (a); provided the whole house is a nuisance. If part only of the house obstructs my lights and creates a nuisance, I am not justified in pulling down the whole building (b).

Before an entry is made upon the land of another for the purpose of abating a nuisance, notice should be given to the occupier of the land of the existence of the nuisance, and he should be required to abate it himself (c); and the plea justifying the entry should contain an averment that notice was given to the plaintiff to abate the nuisance, and that he neglected or refused to do it, whereupon the defendant entered upon the plaintiff's land and abated it himself, using no more violence than was necessary for the purpose (d).

Where there is any immediate danger to life from the continuance of the nuisance, so as to render it unsafe to wait for its removal by the occupier, the injured party may at once enter and remove it; but the facts establishing the necessity should be set forth in the special plea.

A distinction has been taken between nuisances of commission and omission; and it is said that if the plaintiff was the original wrong-doer, and himself created the nuisance, it may be abated without notice; but if the nuisance was levied by another, and the defendant succeeded to the possession of the *locus in quo* afterwards, then notice to remove it must be given and averred in the plea, in order to make out a justification (e). "There is no decided case," observes Best, J., "which sanctions the abatement by an individual of nuisances of omission, except that of cutting the branches of trees which overhang a public road, or the private property of the person who cuts them. The security of lives and property may, however, sometimes require so speedy a remedy, as not to allow time to call on the person on whose property the mischief has arisen to remedy it; and, in such cases, an individual would be justified in abating a nuisance from omission without notice. In all other cases of such nuisances, persons should not take the law into their own hands, but follow the advice of Lord Hale, and appeal to a court of justice" (f).

Where an encroachment had been made on a common, and a house built which obstructed the exercise of the right of common, it was held that the commoner might, after notice and request to the wrong-doer to

(a) *Rex v. Rosewell*, 2 Salk. 459.

(b) *James v. Hayward*, 1 W. Jones, 221.

(c) *Perry v. Fitzhove*, 8 Q. B. 776.

(d) *Davies v. Williams*, 16 Q. B. 550; qualifying *Perry v. Fitzhove*, 8 Q. B.

757.

(e) *Jones v. Williams*, 11 M. & W. 176.

(f) *Lonsdale v. Nelson*, 2 B. & C. 311.

remove the house, pull it down, though the latter was at the time actually present in the house with his family (g).

Abatement of nuisances arising from the exercise in excess of limited rights.—Where a party who is entitled to a limited right exercises it in excess, so as to produce a nuisance, and the nuisance cannot be abated without obstructing the enjoyment of the right altogether, the exercise of the right may be entirely stopped, until means have been taken to reduce it within its proper limits. “Thus if a man,” observes Alderson, B., “has a right to send clean water through my drain, and chooses to send dirty water, every particle of the water may be stopped, because it is dirty.” So, if a man has a limited right to the use of a window, and he enlarges the window considerably, the person annoyed by the enlargement of the window may, by erecting a screen or barrier on his own land, stop up the whole of it. The party who is in that way prevented from the exercise of a limited right, because he has turned it into a larger claim, has no other resource than to reduce his window to a proper size, and then insist on his right to have it tolerated (h).

If a landlord has been content to allow the publick a limited right of way over his lands, and across a brook by a certain number of stepping-stones, the Commissioners of Highways have no right to widen the foot-path or the stepping-stones, or do anything to increase the publick accommodation, or enlarge the right of passage, without the consent of the landowner. If, therefore, the surveyor makes a bridge over a stream, in lieu of stepping-stones, or places flag-stones on the stepping-stones, the landowner has a right to remove them (i).

Abatement of obstructions in publick thoroughfares.—A private individual cannot, of his own authority, abate an obstruction in a publick highway, unless it does him a special injury; and he can only interfere with it as far as is necessary to enable him to exercise his right of passing along the highway. He cannot, therefore, justify doing any damage to the property of the person who has improperly placed the nuisance in the highway, if, avoiding it, he might have passed on with reasonable convenience (k). To justify a private individual in pulling down a wall or destroying a fence, on the ground of its being an obstruction in a publick highway, it must be shown, not only that the wall or fence encroached upon the publick thoroughfare, but that the defendant was unable to

(g) *Davies v. Williams*, 16 Q. B. 546;
20 Law, J., Q. B. 330.

(h) *Cawkwell v. Russell*, 26 Law, J.,
Exch. 34.

(i) *Sutcliffe v. Surveyors, &c. Sowerby*,

35 Law, T. R., Q. B. 7.

(k) *Dimes v. Pettley*, 15 Q. B. 288.
Davies v. Mann, 10 M. & W. 546. *Mayor*
of Colchester v. Brook, 7 Q. B. 377.

enjoy his right of passing along the road without the removal of the obstruction (*l*).

Abatement of obstructions to the navigation of navigable rivers.—To justify a private individual in breaking down a weir or sluice, or removing an obstruction in the channel of a navigable river, it must be shown that the obstruction was of such a nature as to prevent him from passing up and down the river. If there was sufficient space left for him to pass with reasonable safety, he cannot justify the removal of the obstruction (*m*). The 4th statute 25 Ed. 3, c. 4, reciting that the common passage of boats and ships in the great rivers of England is oftentimes annoyed by the setting up of gorges, mills, weirs, stanks, stakes, and kiddles, provides for the utter destruction of all such as have been levied and set up in the time of Edward 1 and after. It directs writs to be sent to the sheriffs, to survey, and inquire, and do execution thereof. The effect of this statute appears to be to legalize weirs which can be shown to have been erected prior to the time of Edward 1, although, from changes in the bed of the river, they may have the effect of totally preventing the navigation of the stream (*n*).

Penalties have been imposed by statute upon all persons having charge of vessels who shall throw any ballast, gravel, earth, rubbish, or filth, into any navigable river, so as to tend to the injury or obstruction thereof; and the person having charge of the vessel will be responsible for the acts of the crew, and may be convicted of the offence and fined, though he was not on board at the time it was committed (*o*).

Abatement of nuisances—Pulling down ruinous houses adjoining a publick thoroughfare.—The Metropolitan Building Act (7 & 8 Vict. c. 84, s. 40) authorizes the pulling down of ruinous buildings under certain circumstances and contingencies, and provides (ss. 41, 42), for payment of the expenses by the owner, being the person entitled to the immediate possession thereof (*p*), and also by the occupier.

Statutory remedies and penalties in respect of nuisances and injuries arising from gas-works.—By the statute 10 & 11 Vict. c. 15, for comprising in one general act sundry provisions to be contained in acts of parliament thereafter passed, authorizing the construction of gas-works for supplying towns with gas, penalties are imposed (s. 11) upon parties authorized by statute to construct gas-works, for delays in making good broken ground, and reinstating roads broken up by them, and removing rubbish; and, in case of delay, the persons having the control or management of the street, &c.,

(*l*) *Bateman v. Bluck*, 18 Q. B. 876; 329.
21 Law, J., Q. B. 406.

(*m*) Ante, p. 101. *East Co. Rail. Co. v.*
Dorling, 28 Law, C. P. 202.

(*n*) *Williams v. Wilcox*, 8 Ad. & E.

(*o*) *Michel v. Brown*, 28 Law, J., M. C.
53; 54 Geo. 3, c. 159, s. 11.

(*p*) *Ex parte Overseers of Saffron Hill*,
24 Law, J., M. C. 56.

may do what is necessary to be done, and recover their expenses from the persons authorized to construct the gas-works. A penalty of 200*l.* is also imposed (s. 21) upon such parties, and upon gas companies, for corrupting streams, ponds, and drains with the refuse or filth of gas-works. It is recoverable for each offence, with full costs of suit in any of the superior courts (s. 22) by the person whose water has been fouled by the gas-washings or refuse, provided the action is brought during the continuance of the offence, or within six months after it shall have ceased. In addition to this penalty of 200*l.*, a sum of 20*l.*, to be recovered in like manner, is to be paid for each day during which gas-washing or refuse is allowed to flow into and foul the water, after the expiration of twenty-four hours from the time when notice of the offence (s. 23) shall have been served by the person whose water has been fouled; and such penalty is to be paid to the latter. And whenever any water within the limits of the special act is fouled by the gas, a sum of 20*l.* is forfeited for every such offence (s. 25), and 10*l.* a-day for every day during which the offence shall continue, after twenty-four hours' notice of the offence. By s. 29 of this statute, it is enacted that nothing in this or the special act contained shall prevent the undertakers (the persons authorized to construct the gas-works and make gas) from being liable to an indictment for nuisance, or to any other legal proceeding to which they may be liable, in consequence of making or supplying gas. The ordinary remedy by action for damages, therefore, is maintainable for a nuisance arising from gas-works, notwithstanding the existence of the penal clauses in this statute (q).

Of actions for nuisances — Private injuries resulting from a publick nuisance.—Wherever a special or particular damage is sustained by a private individual from a publick nuisance, an action for damages is maintainable (r). It has been held that the prevention of customers from coming to a colliery by obstructing a public highway, per quod the benefit of the colliery was lost, and the coals dug up depreciated in value, was such a special and particular damage as would enable the owner of the colliery to maintain an action for the private injury resulting from the publick nuisance (s).

In an action for damages from the unlawful obstruction of a publick thoroughfare, the plaintiff proved that he carried on business as a bookseller in a shop abutting upon the obstructed thoroughfare, and that his customers consisted almost entirely of persons who had been in the habit

(q) Willes, J., *Broadbent v. Imp. Gas Light Co.*, 26 Law, J., Ch. 280.

(r) *Soltau v. De Held*, 2 Sim. N. S. 145; 21 Law, J., Ch. 169.

(s) *Iveson v. Moore*, 1 Ld. Raym. 486; 1 Salk. 15; Carth. 451. *Green v. Lond. Gen. Omnib. Co.*, 35 Law, T. R.

of using the thoroughfare, and that his business had materially declined in consequence of the obstruction, it was held that the injury thus sustained by the plaintiff was such as to entitle him to maintain an action for damages, notwithstanding there might be many individuals on the same line of thoroughfare similarly damnified by the act of which he complained (*t*). And where the plaintiff, in an action for damages from an obstruction in a publick navigable tidal river, declared that he carried on the business of an innkeeper in a house abutting upon the river, and that the defendant placed beams and spars in the water which floated backwards and forwards with the tide, and obstructed the access to the house at certain periods, whereby the plaintiff's customers were prevented from coming to his house to take refreshments, it was held that this was a specific particular damage resulting to the plaintiff from the publick nuisance, which entitled him to an action for damages (*u*).

Where the plaintiff was navigating a publick navigable river with his barges laden with goods, and the barges were impeded in their progress by a vessel which the defendant had wrongfully moored across the stream, and the plaintiff, in consequence of the obstruction, was compelled to unload his barges and carry his goods by land to their place of destination, it was held that the plaintiff was entitled to recover from the defendant all the expenses of the land-carriage of the merchandize (*x*).

No one can have an action for a nuisance or obstruction in a common highway without assigning some particular damage to himself individually, independent of the general inconvenience to the publick (*y*).

When a notice to abate or discontinue a nuisance should be given before commencing an action.—If an action is brought against the originator of a nuisance, it is not necessary to demand the abatement or discontinuance of the nuisance before commencing the action. But if the action is brought against the mere continuer of a pre-existing nuisance, a request to remove the nuisance must be made before the action is commenced (*z*). A notice to abate or remove a nuisance, delivered at the premises to which it relates to the occupier for the time being, will bind a subsequent occupier (*a*).

If a man commits a nuisance, and afterwards does away with it, and with all the effects of it, before action brought, the cause of action is extinguished (*b*); but the abatement of the nuisance is no defence in

(*t*) *Wilkes v. Hung. Market Co.*, 2 Sc. 446; 2 Bing. N. C. 281.

(*u*) *Rose v. Groves*, 6 Sc. N. R. 653; 5 M. & Gr. 613.

(*x*) *Rose v. Miles*, 4 M. & S. 101.

(*y*) *Chichester v. Lethbridge*, Willes, 73.

(*z*) *Penruddock's case*, 5 Co., 100b. *Winsmore v. Greenbank*, Willes, 583.

(*a*) *Salmon v. Bensley*, R. & M. 189.

(*b*) Bro. Abr., pl. 2.

point of law against a complaint for an antecedent injury. If damage has been sustained, the defendant is not the less bound to compensate for that, because he has promptly and properly repaired his fault (c).

Continuing nuisances.—The continuance of the nuisance is a fresh injury, for which another action may be brought, and so, toties quoties, until the obstruction is removed (d). Parties may be liable for the continuance of a nuisance which they themselves originally created, although they are not in possession of, or interested in, the soil on which the nuisance exists; and they have no right to enter thereon for the purpose of abating the nuisance (e).

Of the parties to be made plaintiffs.—The actual occupier of lands and buildings incommoded and prejudiced by a nuisance is, in general, the proper party to maintain an action for damages. If the injured property is in the occupation of tenants to whom it has been demised, the landlord or reversioner has no right of action, unless the nuisance is of a permanent character, and necessarily inflicts a lasting injury upon the inheritance. It has been holden, for example, that the reversioner is not entitled to maintain an action for damages arising from the erection of a noisy workshop, or a furnace and smoky chimney, in close contiguity to dwelling-houses in the occupation of his tenants, although the noise and the smoke render the houses uninhabitable, and the tenants give notice to leave; for the occupiers of the workshop and the furnace may be compelled, by proceedings on the part of the tenants, to discontinue the nuisance. "The action," observes Bramwell, B., "should be brought by the tenant. It is said that the noises diminished the value of the premises. I do not agree to that. If the tenant is damaged by them to the value of 10*l.*, he will get 10*l.* compensation." "In order to give a right of action to the reversioner," further observes Pollock, C. B., "the injury must be of a permanent nature. Here the hammering and noises may be stopped and the nuisance removed at any time" (f). If, however, the tenant actually leaves the premises, and the reversioner comes into possession, then an immediate injury accrues to him, in respect of which he has an immediate right of action.

Where, on the other hand, a building was erected, the roof and eaves of which overhung the plaintiff's land, and discharged rain-water thereon, and the plaintiff brought his action for an injury to his reversion, the land being in the occupation of his tenants, it was held that he was entitled to recover, as the very existence of the building was a nuisance

(c) *Bell v. Twentyman*, 1 Q. B. 774.

(d) *Shadwell v. Hutchinson*, 4 C. & P. 833.

(e) *Thompson v. Gibson*, 7 M. & W. 460.

(f) *Mumford v. Oxfrd. Worc. & Wols. Rail. Co.*, 1 H. & N. 35. *Simpson v. Savage*, 1 C. B., N. S. 347; 28 Law, J., C. P. 50.

and permanent injury to the property, and would, if allowed to continue, impose a servitude thereon (*g*).

When several persons have a joint interest in property injured by a nuisance, they ought all to be made plaintiffs in an action for the injury. Tenants in common, also, should join in an action for a nuisance done to their land (*h*).

Of the parties to be made defendants.—We have seen that the occupier of lands is in general responsible for the continuance of a nuisance upon them; and so is the landlord, if the nuisance existed at the time he demised them (*i*). Every person who does, or directs the doing, of an act which cannot be done at all without constituting and creating a nuisance, is personally responsible, whether he was acting for himself, or for or on behalf, or for the benefit, of another, and whether he is a principal and employer, or a mere servant carrying into effect the orders of his master (*k*). But a steward, manager, or agent, who merely hires labourers for his master, and takes no part in the immediate creation of the nuisance, is not answerable for the nuisance (*l*). If the landlord of a house, under a contract with his tenant to whom he has demised the house, employs workmen to repair the house, the landlord is responsible for a nuisance in the house occasioned by the negligence of his own workmen, although the repairs are done at the instance and for the benefit of the tenant, and are, when executed, to be paid for by him (*m*).

When a defendant is sought to be made responsible for a nuisance, not on the ground of his being the owner or the occupier of the land or premises on which the nuisance exists, but because he has ordered or directed the doing of an act in a publick thoroughfare, or a navigable river, or on the land of the plaintiff himself, which has created a nuisance, it must be shown that the relationship of master and servant exists between the defendant and the workmen who have personally done the act complained of, or that the workmen were acting under his immediate control and directions. If the execution of repairs to a dwelling-house, or the construction of a drain, is intrusted to a builder or contractor, who exercises an independent employment, and selects his own servants and workmen, and has the immediate control and superintendence of the work, the owner of the house, who employs the contractor, is not responsible for the creation of nuisances in the publick thoroughfare, by the negligence of the contractor's servants, if he was ignorant of their unlawful

(*g*) *Tucker v. Newman*, 11 Ad. & E. 40; ante, p. 64.

(*h*) *Bac. Abr.*, JOINT TENANTS, &c. K.; ante, p. 10; post, ch. 19.

(*i*) *Ante*, pp. 76–77. *Bishop v. Trustees*

Bed. Charity, 28 Law, J., Q. B., 215.

(*k*) *Wilson v. Peto*, 6 Moore, 49. *Witte v. Hague*, 2 D. & R. 33.

(*l*) *Stone v. Cartright*, 6 T. R. 412.

(*m*) *Leslie v. Pounds*, 4 Taunt. 648.

proceedings, and had no knowledge of the probable consequences of their acts (n).

If any excavations or constructions, or works of any kind, are authorized to be done, over or across a publick thoroughfare, by private individuals or a publick company, or by commissioners, and the works are lawful in themselves, or can be done without injury to individuals, and without creating any nuisance, and the parties directing the works to be executed employ a contractor to do the work, who selects the workmen, and has the entire conduct and management of the work, the parties so employing the contractor, and authorizing the execution of the works, are not themselves responsible for nuisances or injuries arising from the incompetence of the contractor, or the negligent execution of the works by him, his servants, or agents, or for damage resulting from things done by the contractor or his workmen, which were never authorized or ordered to be done by the company or commissioners (o).

Where certain commissioners, appointed under an act of parliament for the improvement of the navigation of a canal, agreed with a contractor for the performance of certain works for drainage and carrying off the surplus waters of the canal, and the contractor, in the exercise of the powers conferred on the commissioners by the legislature, constructed a drain through the land of the plaintiff for the purpose of carrying off the waste water, and the plaintiff's land was flooded in consequence of the defective and negligent construction of the drain, it was held that the contractor, and not the commissioners, was responsible for the nuisance, as the contractor was not the servant of the company, but occupied an independent position, having the selection and entire control of the workmen, and sole management of the works (p).

In this case the defective drain, causing the overflow of the water and creating the nuisance, was on the plaintiff's own land. Had the nuisance arisen upon the land of the defendants, they would have been responsible for it (ante, pp. 75, 92). Where the defendants have employed a contractor to do an act which is unlawful in itself, or which cannot be done without creating a nuisance, then the act done by the contractor is in substance their act, and they are responsible for the consequences which naturally result from it (q).

The action may be brought against all the persons doing, or ordering

(n) *Peachey v. Rowland*, 13 C. B. 185.

(o) *Knight v. Fox*, 5 Exch. 725; 20 Law, J., Exch. 9. *Overton v. Freeman*, 11 C. B. 807; 21 Law, J., C. P. 52. *Peachey v. Rowland*, 13 C. B. 182; 22 Law, J., C. P. 81, qualifying *Bush v. Steinham*, 1 B. & P. 404. And see post, ch. 9, s. 2, CON-

TRACTOR AND SUB-CONTRACTOR.

(p) *Allen v. Hayward*, 7 Q. B. 900; 15 Law, J., Q. B. 99.

(q) *Ellis v. Sheff. Gas Co.*, 2 Ell. & Bl. 767; 23 Law, J., Q. B. 42. And see post, ch. 9, s. 2; ch. 19.

the doing, of the wrongful act, as well as against the occupier of the land on which the nuisance exists; but, instead of bringing his action against all jointly, the plaintiff may, as we have seen, sue one or more of them at his election (r).

Declarations for nuisances.—If the plaintiff complains of smoke or noisome smells and exhalations, or noises emanating from the defendant's land, the declaration should set forth the plaintiff's possession of certain tenements adjoining other tenements in the occupation of the defendant, and the creation and continuance by the defendant of the nuisance on the land and tenements in his occupation, setting forth the nature of the nuisance, and alleging that the plaintiff was thereby disturbed and annoyed in the occupation and enjoyment of his property, and the property itself was deteriorated in value. If the plaintiff has been impeded in the exercise of his trade or profession, or any special damage has been sustained, it should be stated as a consequence of the wrong done, and the declaration should conclude with a claim of a specific sum for damages (s).

If the injury of which the plaintiff complains arises from the fall of chimneys from the defendant's premises upon the plaintiff's house, or from filth and rubbish being allowed to run down from the defendant's premises upon the plaintiff's land, the plaintiff may declare for a trespass upon his land, alleging that the defendant cast thereon large quantities of stones, bricks, and rubbish, night-soil, filth, or manure, as the case may be (t), and flooded the plaintiff's premises, and disturbed him in the occupation and enjoyment of his dwelling-house, or he may declare for the consequential injury arising from acts of commission or omission by the defendant on his own land. We have seen that the duty of cleansing and repairing drains used by the occupier of a house devolves upon such occupier, and not upon the landlord. A declaration, therefore, which merely alleges that the defendant is the owner and proprietor of the drains or the houses, and seeks to cast upon him, as such owner, a legal obligation to make good the damage ensuing to his neighbour from their foul or dangerous condition, is bad on general demurrer, unless it shows some special ground for making the defendant liable as owner (u).

Where the plaintiff declared that he was possessed of a cellar contiguous to the defendant's privy, and parted by a wall, part of the defendant's house, which the defendant, "*debuít et solebat reparare*," and

(r) Ante, pp. 10, 65; post, ch. 19.

(s) Ante, pp. 72, 73; post, ch. 20.

(t) *Gregory v. Piper*, 9 B. & C. 591.
Tenant v. Golding, 1 Salk. 21. *Pickering*

v. Rudd, 1 Stark, 58.

(u) *Russell v. Shenton*, 3 Q. B. 457.
Chauntler v. Robinson, 4 Exch. 169.

that, for want of repair, the filth of the privy ran into the cellar, it was moved, in arrest of judgment, that this being a charge laid upon the occupier of the adjoining land, the plaintiff should have showed a title by prescription to have the wall kept in repair for his benefit, "sed non allocatur;" for it is a charge laid on the defendant of common right, which by law he is subject to. As one is bound to keep his cattle from trespassing on his neighbour's ground, so he must a heap of dung, if he erects it. "Sic utere tuo ut alienum non lædas" (x).

A declaration setting forth the plaintiff's possession of a messuage and land, and the defendant's possession of an adjoining brew-house, and that the defendant caused water to be conveyed from a certain spring through leaden pipes placed near the foundations of the plaintiff's house, and took so little care of the pipes, or so negligently used and managed them, that the water escaped from the pipes, and flooded the plaintiff's house, and injured the foundations thereof, and caused the walls of the house to crack and give way, &c., discloses a good cause of action (y).

When the plaintiff complains of the pollution of a stream, he should show that he was in the actual enjoyment of pure water, or that, by reason of his possession of a messuage or land, he had a right to the flow of a stream of water through his premises in its natural purity (ante, pp. 11, 66, 67), and that the defendant polluted it. If the injury has resulted from negligence on the part of the defendant, in not having properly fenced or guarded a hole or cellar, or dangerous excavation on his premises, the declaration should show that the defendant was the occupier of the cellar and premises; that the cellar closely adjoined a publick footway, and opened thereon, so as to be dangerous to persons passing along it, or that the hole or excavation was within twenty-five yards of a publick highway; and that the defendant wrongfully suffered the hole to remain unfenced and unguarded; and that the plaintiff, whilst he was passing along the highway, or along the open unenclosed land adjoining the highway, and within twenty-five yards thereof, fell into the hole and was injured, and prevented from attending to his business, and was obliged to expend money in surgical attendance and advice (z).

It is not necessary to state in the declaration that it was the duty of the defendant to do the act which he is alleged to have neglected to do, but the facts creating the obligation to perform the duty should be set forth. The allegation of duty is useless where the declaration is insufficient, and superfluous where it is sufficient (a).

(x) *Tenant v. Golding*, 1 Salk. 21.

(y) *Hoare v. Dickinson*, 2 Ld. Raym. 1569.

(z) *Bishop v. Trustees Bedfd. Charity*, 28 Law, J., Q. B. 216.

(a) *Metcalf v. Hetherington*, 11 Exch. 270. *Seymour v. Maddox*, 16 Q. B. 831. *Southcote v. Stanley*, 1 H. & N. 247; 25 Law, J., Exch. 247. *Gibbs v. Trust. Liv. Dock*, 3 H. & N. 164.

A declaration alleging that the defendant was a proprietor of a building called, &c., used by the defendant for purposes of gain, that the plaintiff entered and paid for his admission, and that the defendant, not regarding his duty in that behalf, did not carefully and skilfully, and with proper strength and materials, construct and maintain the building and the staircase thereof, so as to be, for the purposes aforesaid, safely and securely used, and that by reason thereof, whilst the plaintiff was in the building, the staircase fell, and the plaintiff was violently thrown down and injured, discloses a good cause of action (*b*).

If the grantor of a private way is bound, by express stipulation or prescription, to repair it, it is sufficient, in an action against him for neglecting to do so, to allege generally in the declaration that he, by reason of his possession of the close in which the way is, ought to repair it, and the special matter of the obligation may be given in evidence (*c*).

When the plaintiff complains of an injury to his reversionary estate, the declaration should allege that, at the time of the committing the grievance of which he complains, certain messuages, tenements, and land, with the appurtenances, were in the occupation of certain persons, as tenants thereof to the plaintiff, the respective reversions in the said messuages, &c. being in the plaintiff, and that the plaintiff and his tenants, by reason of their interest in, and possession of, the said messuages or tenements, and land, of right ought to enjoy the use of the water of a certain well and pump, and that the defendant erected a cesspool so near the well and pump, that the water therein was contaminated and rendered useless by the oozing out of the soil and filth from the cesspool (*d*).

Declarations for injuries from the keeping of ferocious animals.—In actions for injuries from keeping ferocious animals, the plaintiff must set forth in his declaration the mischievous propensity of the animal, the keeping of it by the defendant, with knowledge of such propensity, and the injury to the plaintiff; but the plaintiff need not tie himself down to any allegation of the particular habits of the animal, and of the defendant's knowledge of those habits. He may allege, generally, that the animal was of a ferocious nature, and unsafe to be left at large, and that the defendant knew it, and that he nevertheless permitted the animal to be at large (*e*). It is usual, however, to allege, that the animal was of a ferocious disposition, and accustomed to attack or bite mankind, or sheep and animals, the subject of private property (*f*).

It is not necessary to allege or prove any negligence or want of care

(*b*) *Brazier v. Polytechnic Institution*,
Q. B. 1859.

(*c*) *Rider v. Smith*, 3 T. R. 766.

(*d*) *Metrop. Assocn. v. Petch*, 27 Law, J.,

C. P., 830; ante, pp. 12, 67.

(*e*) *Hartley v. Harriman*, 1 B. & Ald.
624.

(*f*) *Jenkins v. Turner*, 2 Salk. 661.

in the keeping of the animal by the defendant (*g*). The injurious consequences to the plaintiff should be stated; and if any special damage has been sustained, it should be set forth on the face of the declaration.

Of the plea of not guilty in actions for a nuisance.—In an action for a nuisance to the occupation of a house by carrying on an offensive trade, the plea of not guilty will operate as a denial only that the defendant carried on the alleged trade in such a way as to be a nuisance to the occupation of the house, and will not operate as a denial of the plaintiff's occupation of the house (*h*). In an action for forming a cesspool near a well, and thereby contaminating the water of the well, it was held that the plea of not guilty put in issue both the fact of the erection of the cesspool, and that the water was thereby contaminated (*i*). In actions for injuries from acts of omission, the fact that the injury was occasioned by negligence and misconduct on the part of the plaintiff, as well as by neglect of duty on the part of the defendant, is also admissible under the plea of not guilty (*k*). In actions for injuries resulting from the keeping of ferocious animals, with knowledge of their dangerous propensity, the plea of not guilty puts in issue both the fact of the ferocity of the animal and the defendant's knowledge of it; those two matters forming the substance of the wrongful act (*l*).

Pleas justifying the fouling of the water of a stream under a prescriptive right to discharge into it the refuse of dye-houses and manufactories, and the washings of mines.—When the plaintiff complains of the fouling and sending rubbish down a natural stream of water running through the plaintiff's land, it is a good defence to plead that the defendant, at the time of the committing of the alleged injury, was the occupier of land, and of a tin-mine situate thereon, and abutting upon the stream, and that the defendant and all other occupiers for the time being of the land and tin-mine, for the period of twenty years next before the commencement of the action, enjoyed as of right and without interruption (*m*) the privilege of using the water of the stream for the purpose of working the tin-mine, and mining and washing tin-ore, and of fouling the water of the stream with sandstones and rubble and the washings of the tin-mine; and that the defendant, being the occupier of the land and tin-mine, did, in working the mine, and mining and washing the tin-ore, necessarily discharge into the stream sandstones and rubble, and did necessarily foul the water of the stream, and obstruct the channel and bed thereof (*n*). A plea of this

(*g*) *May v. Burdett*, 9 Q. B. 111; 16 Law, J., Q. B. 84.

(*h*) Reg. Gen. 16 Vict. 1 Ell. & Bl., App. lxxxii.

(*i*) *Norton v. Scholefield*, 9 M. & W. 665.

(*k*) *Holden v. Liv. Gas Co.*, 3 C. B. 1.

(*l*) *Card v. Case*, 5 C. B. 622.

(*m*) *Ante*, pp. 41–52.

(*n*) *Carlyon v. Lovering*, 1 Hurl. & Norm. 789; 26 Law, J., Exch. 251.

sort sets up a prescriptive right to the use of the water of the stream for the necessary working of the mine (ante, pp. 43, 44); but it is doubtful whether a plea which merely alleges a user as of right to throw cinders, scoræ, coal-dust, and the refuse of the ash-pit of a steam-engine into a running stream, so as to obstruct the channel and bed thereof, is a good plea, as it does not appear to set up a claim which might lawfully be made at the common law by custom, prescription, or grant to an easement or watercourse, or use of water within the meaning of the Prescription Act (o).

Pleas justifying the poisoning of the atmosphere with noxious smells and exhalations under a prescriptive right to carry on an offensive trade, should set forth that the defendant and his predecessors, occupiers for the time being of the house, and premises, and ground in the declaration mentioned, exercised and enjoyed for the full period of twenty years next before the commencement of the action, as of right and without interruption, the trade of, &c., in and upon the said premises, and thereby, during all that time, divers noisome smells unavoidably arose from the said premises, and extended themselves to the plaintiff's land, and created smells thereon, and that the grievance complained of by the plaintiff was a user by the defendant of his premises for the purposes of such trade (p).

Evidence at the trial.—*Proof on the part of the plaintiff* should be directed to the establishment of all the material allegations in the declaration in the order in which they are set forth, i.e. the plaintiff's possession of a certain tenement adjoining another tenement in the occupation of the defendant, and the existence of a nuisance on the last-named tenement. When the plaintiff sues for a temporary nuisance (ante, pp. 78, 79, 105), he must show that he is the actual occupier of the property injured by the nuisance. When he sues as the landlord or reversioner of the property injured, he must prove that the nuisance was of a permanent character, damaging the marketable value of the property (ante, pp. 15, 64). The nature and character of the nuisance will have to be proved (ante, pp. 75–94); and it must be shown either that it disturbed and annoyed the plaintiff in the occupation and enjoyment of the property, or that the property was deteriorated in value. In actions for a nuisance arising from the carrying on of a noxious trade, the questions for a jury are, was the nuisance such as to make the enjoyment of life and property uncomfortable? and, if so, was the place on which the trade was carried on a proper place for the exercise of such a trade (q)?

(o) *Murgatroyd v. Robinson*, 2 Ell. & Bl. 391; 26 Law, J., Q. B. 233; ante, p. 39.

(p) *Flight v. Thomas*, 10 Ad. & E. 590.

1 Smith's Leadg. Cas. 217.

(q) *Hole v. Barlow*, 27 Law, J., C. P. 208; ante, p. 78.

In order to make the defendant responsible for the nuisance, it must be proved, either that he was the actual occupier of the land or tenement on which the nuisance existed, or that he had authorized or directed the doing of the thing which created the nuisance. Proof of the exercise of acts of ownership over the tenement on which the nuisance exists, such as paying the wages of workmen employed there (*r*), locking the doors, or chaining the gates at night, or giving orders that it should be done, posting bills in the windows, or paying a woman to open the shutters and air the house, will be sufficient *prima facie* evidence of actual or constructive occupation; and any declarations or admissions by the defendant tending to show that the tenement on which the nuisance exists belonged to him, or was under his control, will, of course, be evidence against him (*s*). Proof that the defendant has received rent for the use of a wall-building or pavement, and has previously repaired it when it required repairs, has been held sufficient to render the defendant responsible for a nuisance existing thereon (*t*).

If the plaintiff complains of a nuisance arising from the non-repair of drains and sewers, it must be shown that the defendant had the use and occupation of the drain and sewer. Proof that the defendant occupies the land through which the sewer runs does not cast upon the defendant the duty of cleaning out the sewer or repairing it, or preventing it from becoming a nuisance. It does not follow, from his being the occupier of the land through which the sewer runs, that he has the occupation and use of the sewer. He may never have used it or occupied it, and may have no power to touch it, or interfere with it in any way (*u*). The parties who have a right to use the sewer, and who exercise that right, are in general bound to cleanse the sewer, and repair it, and prevent it from becoming a nuisance, unless the duty of so doing is imposed on others by express legislative enactment (*ante*, pp. 31, 61, 75).

If the defendant is not in the actual occupation of the premises on which the nuisance exists, but it is sought to make him liable, on the ground that he demised the premises with the nuisance existing upon them, it must be proved that the nuisance was in existence at the time of the demise (*ante*, pp. 76, 77). If it is sought to make him liable for injuries arising from dangerous excavations, pits, or holes on premises demised by him, or from the fall of ruinous buildings in the occupation of his tenant, it must be shown that the holes and excavations existed, and

(*r*) *Jarvis v. Dean*, 11 Moore, 359.

(*s*) *Sybray v. White*, 1 M. & W. 440.

(*t*) *Bishop v. Trustees Bed. Charity*, 28

Law, J., Q. B. 215. *Payne v. Rogers*, 2

H. Bl. 349.

(*u*) Post, ch. 5.

that the buildings were ruinous and dangerous to the public at the time he let them (ante, pp. 85, 86). If the action is brought against the occupier of ruinous buildings, which have fallen down and injured the plaintiff, a *prima facie* case will be established against the defendant, merely by proving that he was in the actual or constructive occupation of the property at the time of the injury; and it will be for the defendant to show, if he can, that he was a mere tenant-at-will, and had no knowledge of its ruinous or dangerous condition; or that before the buildings fell he ceased to occupy them, and gave up possession to the landlord (ante, pp. 85-88.)

If the defendant is charged with acts of omission, non-feazance, and neglect of duty, the facts creating the duty must be proved, and the defendant's neglect established. If the injury arises from the non-repair of party walls or fences, it must be shown that the defendant was bound by contract, prescription, or statute, to repair or fence (ante, pp. 46, 71, 88). If it arises from the negligent use and management of buildings, stations (ante, pp. 89, 90, 110), or railways (ante, pp. 88-93), or canals (ante, p. 92), or docks (ante, p. 92), it must be shown that the defendants were in the occupation of the property upon which the dangerous nuisance existed, and had dominion and control over it. If the injury arose from the dangerous state of premises on which the plaintiff was employed as a workman, it must be shown that the danger was latent and unknown to the workman, but well known to the employer (ante, pp. 92-94). If it arose from defective hoisting-tackle in mines or insecure ladders, it must be shown that the defendant knew that the tackle was insecure and unfit to be used, and that the plaintiff had no knowledge of the danger he incurred by using it (ante, pp. 93, 94). If the plaintiff complains of injuries from the dangerous state of premises in the occupation of the defendant, and to which he had come on the invitation of the defendant as a guest, he must show that the danger was of an unusual and unexpected character, the existence of which was wholly unknown to the plaintiff, but was well known to the defendant (ante, pp. 81, 94, 110).

In actions for injuries for keeping ferocious animals, the plaintiff must prove that he has been bitten or hurt, or has sustained some actual damage from the ferocity of the animal, and that the plaintiff kept or harboured the animal with knowledge of its savage disposition (ante, pp. 96-99); but it is not necessary to allege or prove any negligence or want of care in the keeping of it (ante, p. 96). If the plaintiff has not, by his declaration, tied himself down to proof of some particular mischievous propensity on the part of the animal, it is sufficient for him to prove, generally, that the animal was of a ferocious nature, and given to bite, and

that the defendant knew it (*x*). Where a dog was proved to be of a savage disposition, and that the defendant had warned a person to beware of the dog, lest he should be bitten, it was held that this was evidence for a jury of the defendant's knowledge of the nature of the beast (*y*).

Proof of an offer on the part of the defendant to make compensation to the plaintiff is some, but very slight, evidence, against the defendant, as the offer may have been made purely from charitable and praiseworthy motives, and not as admitting any consciousness of wrong or of legal liability in the matter. Where the defendant, being told that his dogs had killed three of the plaintiff's cattle, said, that if they had done it, he would settle for it, it was held that this promise to pay, or settle for the damage done, was some evidence for a jury of knowledge on the defendant's part of the savage disposition of his dogs. "But though," observes the Court, "we think, strictly speaking, it is a fact to go to the jury, yet it ought to have little or no weight at all with them" (*z*); and Lord Ellenborough held that such an offer was no evidence at all of the scienter (*a*).

Evidence for the defence.—Where the plaintiff sues for a nuisance, arising from the exercise by the defendant of a noxious trade, in the vicinity of the plaintiff's dwelling, the defendant may, as we have seen, exonerate himself from liability by showing that the trade was a necessary trade, and that it was carried on by the defendant in a suitable and proper locality for the exercise of such a trade (*b*). If the defendant has put a plea of justification on the record, he must prove the material averment of his plea, and show how his right to create the nuisance arises (ante, pp. 43, 44, 111, 112).

Under the plea of not guilty, the defendant may, as we have seen, show that the injury was occasioned by the plaintiff's negligence and misconduct, as well as by the default of the defendant, and so defeat the plaintiff's claim for damages (*c*). If it be shown that the defendant was a wilful trespasser upon the land of the plaintiff, and must have known that he had no right to be there at the time he sustained the injury of which he complains, his claim for damages will, in general, be defeated.

Damages recoverable.—For every nuisance, the continuance of which would inflict permanent injury upon premises demised to a tenant, and diminish their value in the market, damages are recoverable by the rever-

(*x*) *Hartley v. Halliwell*, 2 Stark, 212; ante, pp. 96-98.

(*y*) *Judge v. Cox*, 1 Stark, 285.

(*z*) *Thomas v. Morgan*, 2 C. M. & R. 502.

(*a*) *Beck v. Dyson*, 4 Campb. 198; and see post, ch. 20.

(*b*) *Hole v. Barlow*, ante, p. 78.

(*c*) Ante, pp. 95, 96. *Tuff v. Warman*, 27. Law, C. P. 322; post, ch. 9, s. 1.

sioner in respect of the injury to the inheritance, as well as by the tenant, in respect of the immediate residential injury. Thus, where the subject of complaint was, that the defendant had fixed a spout to the eaves of his house, which poured rain-water into the plaintiff's yard and made it damp, it was held that this was an injury of a permanent nature, which entitled the plaintiff to damages, although the yard was in the occupation of a tenant (*d*). But where an action is brought by a reversioner to recover damages in respect of an injury to his reversionary estate in certain lands and premises, by reason of a nuisance committed by the defendant, the diminution in the saleable value of the premises is not the true criterion of damage, because every day that the defendant persists in continuing the nuisance, he renders himself liable to another action. Nominal damages are generally given in the first action; and then, if the defendant persists in continuing the nuisance, and another action is brought, and a verdict is obtained against him for continuing the nuisance, the jury generally give exemplary damages, to compel an abatement of the nuisance (*e*). If, however, the jury choose to give substantial damages in the first instance, there is nothing to prevent them from so doing (*f*).

Wherever the nuisance was, in its commencement, an injury to the reversion, on any ground whatever, the continuance of the nuisance must be so likewise, and an action is maintainable by the reversioner, *toties quoties*, until the nuisance is abated (*g*). In all cases of continuing nuisances, the jury cannot lawfully give damages in respect of any injury subsequent to the day of the commencement of the action; for every day that the nuisance continues there is a fresh cause of action, in respect of which further damages are recoverable.

If the plaintiff's house has been thrown down by reason of the negligence of the defendant or his servants in pulling down an adjoining house, the jury ought not to give as much in damages as would be sufficient to build a new house, but should make a reasonable and proper allowance for the benefit which the plaintiff would receive by having a new house instead of an old one. Lord Kenyon likened a case of this sort to the case of marine insurances, where an allowance of one-third new for old was always made (*h*).

In actions for injuries from keeping ferocious animals (*ante*, p. 96) the plaintiff is entitled to recover substantial damages in respect of any bodily anguish he has endured, together with the expenses of surgical

(*d*) *Tucker v. Newman*, 11 Ad. & E. 41.

(*e*) *Battisill v. Reed*, 18 C. B. 714; 25 Law, J., C. P. 290.

(*f*) *Cresswell, J.*, 18 C. B. 712.

(*g*) *Shadwell v. Hutchinson*, 2 B & Ad. 97; *ante*, p. 105.

(*h*) *Lukin v. Godsall*, 2 Peake, 15.

attendance, and all such expenses as have been reasonably and necessarily incurred by him in consequence of the injury, and have been claimed in the plaintiff's declaration. If, in consequence of a bite from a ferocious dog, knowingly kept and harboured by the defendant, the plaintiff has been obliged, under medical advice, to undergo a surgical operation to guard against hydrophobia, this will be a ground for increasing the damages (i).

(i) Post, ch. 21.

CHAPTER IV.

OF INJURIES TO LANDS AND TENEMENTS FROM WASTE,
NEGLIGENCE, AND FIRE.

SECTION I.—*Of injuries to realty from waste, negligence, and fire.*—Commissive and permissive waste—Waste by tenants for life and term of years—Alterations by tenants in premises demised to them—Removal of fixtures and things attached to the freehold—Abandonment of the right to disannex and remove fixtures—Waste committed by strangers upon lands demised to tenants—Injuries to real property from fire and dangerous things set in

motion by tenants and strangers—Fire spreading from blast-furnaces, steam-engines, and railways—Fires occasioned by the negligence of servants—Injuries from gunpowder and explosive substances.

SECTION II.—*Of actions for injuries to realty from waste, negligence, and fire.*—Actions by owners of insured premises—Parties, pleadings, defences, and evidence—Damages recoverable.

SECTION I.

OF INJURIES TO LANDS AND TENEMENTS FROM WASTE, NEGLIGENCE, AND FIRE.

"*Waste*," observes Blackstone, "is a spoil or destruction of houses, gardens, trees, or other corporeal hereditaments, to the disherison of him that hath the remainder or reversion. It is either voluntary, which is a crime of commission, as by pulling down a house, or it is permissive, which is a matter of omission only, as by suffering it to fall for want of necessary reparations. Whatever does a lasting damage to the freehold or inheritance is waste. Tenant for life or term of years was not by the common law responsible for waste, nor was waste punishable," observes Blackstone, "in any tenant, excepting guardian in chivalry, tenant in dower, and tenant by the curtesy. And the reason of the diversity was, that the estate of these three tenants was created by the act of the law itself, which therefore gave a remedy against them; but tenant for life, or for years, came in by the demise and lease of the owner of the fee, and therefore he might have provided against the committing of waste by his lessee: and if he did not, it was his own default" (*k*). But, for the benefit of reversioners, it was provided by the statutes of Marlbridge, 52 Hen. 3,

(*k*) 2 Bl. Com. ch. 18, s. 6.

c. 23, and of Gloucester, 6 Ed. 1, c. 5, that every man from thenceforth should have a writ of waste in the chancery against him that holdeth for term of life or years, or a woman in dower. And he who shall be attainted of waste shall lose the thing that he wasted, and, moreover, shall recompense thrice so much as the waste shall be taxed at. And for waste made in the time of wardship, it shall be done as is contained in the great charter, &c. And by the statute of Westminster the second (13 Ed. 1), cap. 14, it is recited, that whereas for waste done in the inheritance of any person by guardians, tenants in dower, or by the courtesy, or otherwise, for term of life or years, a writ of prohibition of waste had used to be granted, by which writ many were deceived, thinking that such as had done the waste should not need to answer but for waste done after the prohibition to them directed, it was ordained, that from thenceforth a writ of summons should be awarded, and he of whom complaint was made should answer for waste done at any time.

Since the passing of these statutes, therefore, all tenants for life or term of years have been liable in damages for waste, unless their leases have been made to them without impeachment of waste. All tenants, whatever their term or interest, are liable for commissive waste; but a mere tenant-at-will, or from year to year, is not responsible for permissive waste (*l*).

Commissive and permissive waste.—Commissive, or, as it is more frequently termed, wilful waste, consists, amongst other things, in the doing by a tenant of some wilful injury to the premises demised to him, such as pulling down houses and buildings, prostrating walls, removing landlord's fixtures, breaking windows, or tiles and slates, and uncovering the roofs of houses. Permissive waste is where the tenant remains a passive spectator of decay and ruin, doing nothing to accelerate, and making no effort to retard, the evil. A tenant for life is responsible for permissive as well as commissive waste, so that if a house holden by him for life is uncovered by tempest, he must in convenient time repair it, and, if it is thrown down, he must rebuild it; but if the house was uncovered when he came in, it is then no waste to suffer it to fall down, as he is not bound to keep up and maintain a mere ruin (*m*). A tenant for term of years is bound to take reasonable care of the property demised to him; and if windows are broken by the wind or hail, he is liable for the non-repair of them, if the consequences of his neglect would be damage to the building from rain. He must not suffer a roof of thatch to remain uncovered, so as to let the timbers rot, and must use all reasonable endeavours to keep the buildings wind and water-tight; but he is not bound to repair the principal timbers

(*l*) *Harnett v. Maitland*, 16 M. & W. 257. *Gibson v. Wells*, 1 N. R. 290.

(*m*) *Co. Litt.* 53 Bac. Abr. (WASTE). *Wise v. Metcalfe*, 10 B. & C. 314.

of the roof, nor to replace old materials with new, except where the expense is of a trifling character, and the mischief, if neglected and left unrepaired, would operate to the lasting injury of the inheritance.

The extent of the liability of a lessee, not holding under a covenant or agreement to repair, for permitting buildings demised to him to go to decay and ruin, will depend upon the age and general state and condition of the buildings at the time he took possession of them, the nature and extent of the repairs required for their preservation, and the duration of his own term and interest in the property; for a tenant-at-will, or tenant from year to year, cannot be expected to do as much for the preservation of the property as a tenant for a long term of years (*n*). Where an action on the case was brought by a lessor against a lessee holding from year to year, for suffering a house demised to him to go to ruin for want of repairs to the roof and windows, it was held that such an action was not maintainable. "There is no doubt," observes Mansfield, C. J., "but that an action on the case may be maintained for wilful waste; but, at common law, if any part of the premises are suffered to be dilapidated, it amounts to permissive waste; and if this action be maintainable, such an action might be brought against a tenant-at-will who omitted to repair a broken window. I think this action is an innovation, and I am not disposed to encourage it" (*o*). "There is a very wide distinction," further observes Gibbs, C. J., "between wilful and permissive waste. Where the tenant has committed waste by pulling down and taking away fixtures which belonged to the premises, there an action on the case may be maintained against him. And where the defendant has covenanted to repair, the plaintiff may bring his action on the covenant in the lease for allowing the premises to go to decay, but he cannot sue for permissive waste" (*p*).

Commissive waste.—Whenever a tenant or lessee makes material changes in the nature of the premises demised to him, which have the effect of converting them into something substantially different from what they were at the time they were placed in his hands, he is guilty of commissive waste, and is responsible in damages for infringing upon the proprietary rights of the landlord. The tenant by the lease has the use, not the dominion, of the property demised to him, and cannot make permanent changes and alterations in the property, although such changes and alterations may greatly enhance the value of it; for the owner has a right to have his houses and lands kept in an unaltered state, surrounded by all their old features, landmarks, and associations. Therefore an action is

(*n*) Addison on Contracts, pp. 378, 379, 4th edit.

(*o*) *Gibson v. Wells*, 1 N. R. 290. *Herne v. Bembow*, 4 Taunt. 764. *Martin v. Gil-*

ham, 7 Ad. & E. 543.

(*p*) *Jones v. Hill*, 1 Moore, 100; 7 Taunt. 392. *Horsefall v. Mather*, Holt, N. P. C. 9.

maintainable by the reversioner pending the term against the tenant for inclosing and cultivating waste land included in the demise, and for continuing the grievance (*q*); also for the pulling down of an old building, and the substitution in lieu thereof of tenements of greater value (*r*), and for removing a partition-wall in a house and enlarging a chamber (*s*).

Where a lessee opened a new door in a house, whereby the house was not in any respect weakened or injured, it was held to be a question for the jury whether there was or was not any injury to the rights of the reversioner (*t*). But if there is any substantial alteration in the form and arrangement of the house, the house is no longer the same house, and there is an invasion of the proprietary rights of the landlord or reversioner. It is no answer to an action for the infringement of these rights to say that the defendant might, before the expiration of the lease, restore the premises to their former plight, and surrender them up to the landlord in their original condition (*u*). A lessor may sue for commissive waste, although the lease contains a covenant upon which the lessor might maintain an action for the same wrong. It is no answer for the lessee to say that an action of covenant may also be maintained against him in respect of the same cause of action, for the lessor may have either remedy (*x*).

The lessee of a water-mill, worked by a head of water penned back under a prescriptive right to pen back water for the purpose of working the mill, has no right to alter the height of the tumbling-bay, or transpose or alter the old permanent water-marks, as it tends to destroy the landlord's evidence of title to the head of water, and goes to the destruction of the thing granted. The lessee of house-property must not remove wainscots or floors, nor pull down and rebuild, open new windows and doors, and change the form and arrangement of the house, without the consent of the owner. He cannot convert one species of edifice into another, such as a corn-mill into a fulling-mill or malt-mill, or a water-mill into a windmill, though the conversion be to the pecuniary advantage of the landlord, as well as to the benefit of the tenant (*y*). He must not fell timber-trees (except for the necessary repairs of a house he has covenanted to repair), nor destroy spring-woods or young plants destined to become trees; but he may cut willows, maples, beeches, and thorns, if they do not shelter a dwelling-house or sustain a bank, or afford shelter to cattle, and the cutting of them is not prejudicial to the inheritance.

(*q*) *Provost, &c. Queen's College v. Hall*, 14 East, 489.

(*r*) *Cole v. Green*, 1 Lev. 309.

(*s*) 2 Roll. Abr. 815, pl. 9.

(*t*) *Young v. Spencer*, 10 B. & C. 145.

(*u*) *Provost, &c. Queen's College v. Hal-*

lett, 14 East, 489.

(*x*) *Kinlyside v. Thornton*, 2 W. Bl. 1111. *Torriano v. Young*, 6 C. & P. 8. *Marker v. Kenrick*, 13 C. B. 198.

(*y*) Bac. Abr. (WASTE). *Cole v. Forth*, 1 Mod. 94, Co. Litt. 53a, 53b.

He may also cut oaks and ashes where they are usually cut as underwood, and are in due course to grow up again from the stumps, and the cutting is warranted by local custom and usage. He must not dig for gravel, lime, clay, brick earth, stone, or the like, except for the necessary repair and improvement of the demised premises, in fulfilment of the covenant of his lease. He must not remove virgin soil (*z*), nor open quarries or mines of metal or coal, for the purpose of selling the produce thereof; but he may work mines and quarries which were open and in existence at the time of the demise, as they then form part of the annual profits of the land. He must not convert arable land into pasture, or pasture into arable land, or plough up a warren, or stub up a wood to make it pasture, or divert the courses of streams, nor dry up ancient pools or fish-ponds, nor destroy fences, nor put land under water, nor destroy the stock or breed of anything. He must not take all the fish out of a fish-pond, or the doves from a dovecote, or the deer from a park, or the rabbits and conies from a warren, or the game from preserves; but he is entitled to the reasonable use and enjoyment of them, leaving as many in store for the landlord when he goes out as he found when he was intrusted with the possession and use of the property (*a*).

Waste may be committed by removing glass annexed to windows, for it is parcel of the house; and although the lessee himself, at his own cost, put the glass in the windows, yet, being once parcel of the house, he cannot take it away or waste it. Wainscot also, be it annexed to the house by the lessor or the lessee, is parcel of the house, and cannot be removed, unless it is purely of an ornamental character (post, p. 125); and there is no difference in law if it be fastened by great nails or little nails, or by screws or irons put through the post or walls (*b*), for every chattel affixed to the soil of another becomes a part of the soil, and belongs to the owner of the land, unless it is shown to have been affixed there in the necessary enjoyment of an easement by the party entitled to the easement, in which case it will belong to the latter, and not to the owner of the soil (*c*).

Waste from the removal of fixtures.—"Questions respecting the right to what are ordinarily called fixtures," observes Lord Ellenborough, "principally arise between three classes of persons. First, between different descriptions of representatives of the same owner of the inheritance, viz. between his heir and executor. In this first case, *i. e.* between heir and executor, the rule as to severance obtains with the most rigour in favour

(*z*) *Higgon v. Mortimer*, 6 C. & P. 616.

(*a*) *D'Arcy (Ld.) v. Ashwith*, Hob. 234.

Phillips v. Smith, 14 M. & W. 593. Bac. Abr. (WASTE), Litt. s. 71.

(*b*) *Herlakenden's case*, 4 Co. 63b. *Wilde v. Waters*, 16 C. B. 637.

(*c*) *Lancaster v. Eve*, 5 C. B., N. S. 717, 7th Week Rep. 260.

of the inheritance and against the right to disannex therefrom, and to consider as a personal chattel anything which has been affixed thereto. Secondly, between the executors of tenant for life or in tail, and the remainderman or reversioner; in which case the right to fixtures is considered more favourably for executors than in the preceding case between heir and executor. The third case, and that in which the greatest latitude and indulgence have always been allowed in favour of the claim of severance, as against the claim in respect of freehold or inheritance, is the case between landlord and tenant" (d).

As between heir and executor, the rule is, that where a lessee, having annexed anything to the freehold during his term, afterwards takes it away, it is waste. But this rule, at a very early period, had several exceptions engrafted upon it in favour of trade, and of those vessels and utensils which are immediately subservient to the purposes of trade. And it was laid down that if a lessee for years erect a furnace for his advantage, or a dyer make his vats or vessels to occupy his occupation during his term, he may remove them; but if he suffer them to be fixed to the earth after the term, then they belong to the lessor. And so of a baker. And it is not waste to remove such things within the term (e). And as between the executor and the heir-at-law, it has since been held that where a fixed instrument, engine, or utensil, or a building covering machinery, is accessory to matter of a personal nature, then it shall itself be considered personalty, and belong to the executor, such as a fire-engine accessory to the carrying on the trade of getting and vending coals; or a brew-house furnaces and coppers, or a cider-mill, or varnish-house; but salt-pans connected with salt-springs, and erected for the benefit of the inheritance, and barns and agricultural buildings, erected for farming purposes, are not by the common law removable by executors, but belong to the heir (f).

The cases regarding the right of removal of fixtures, as between the executor of a tenant for life and the remainderman, will be found to turn each on its own peculiar circumstances; the character of the fixture, the use made of it, the mode of its attachment to the freehold, the facility of severance, the injury to the freehold by severance, and, in regard to an ecclesiastical benefice, the character and object of the building to which the chattel is attached, and the purpose for which it was attached. A building erected by an incumbent, which is in itself mere matter of luxury and ornament, which it would be a burthen to the benefice to keep up, and which the incumbent might have pulled down if he thought fit, and

(d) *Elwes v. Maw*, 3 East, 53.

(e) *Ib.* 20 Hen. 7, 13a.b.

(f) *Ib.* 2 Smith's Leadg. cas. 128-160, 4th edit.

which may be detached without injury to the freehold, passes in general as part of the personal estate to the executors of the deceased incumbent, and may be taken away by them (*g*).

The right to remove fixtures, without incurring liability for waste, is considered at length in many learned treatises (*h*); and the remainder of the present chapter will be confined to the consideration of fixtures that have been held removable, or irremovable, as between landlord and tenant.

The general rule is, that where a lessee, having annexed a personal chattel to the freehold during his term, afterwards takes it away, it is waste. In the progress of time this rule has been relaxed, and many exceptions have been grafted upon it. One has been in favour of ornament, as ornamental chimney-pieces, pier-glasses, hangings, wainscot fixed only by screws, and the like. Of all these, it is to be observed that they are exceptions only (*i*). Other exceptions have been grafted upon the rule in favour of trade, and vessels, machinery, and utensils, which are immediately subservient to the purposes of trade. Pillars of brick and mortar, built on the floor of a dairy by a tenant to sustain milk-pans, have, however, been held to be part of the freehold (*k*); also barns and beast-houses, wagon-houses, fuel-houses, pigeon-houses, carpenters' shops for mending wagons and carts, and agricultural buildings employed and used upon the farm, and let into the ground, and not merely placed on the surface thereof, or on a brick or stone floor (*l*); also conservatories, hot-houses, or green-houses, erected on a brick or stone foundation, and attached thereto by permanent fastenings; so that if the tenant removes them after he has put them up, he is guilty of waste (*m*). But if the tenant raises and constructs foundations of a permanent character for the reception of a superstructure of wood, such as a windmill, a pump, a Dutch barn or granary, a pigeon or fowl-house, or a conservatory, and the superstructure merely rests on this foundation, or is attached thereto by screws or movable pins or bolts, so as to be removable at pleasure without material or permanent injury to the freehold, the foundation belongs to the landlord as part and parcel of the land, and the movable structure placed on such foundation by the tenant continues the property of the latter, and may be carried away by him at the expiration of his

(*g*) *Martin v. Roe*, 7 Ell. & Bl. 248.

(*h*) *Amos & Ferrard on Fixtures*; *Grady on Fixtures*.

(*i*) *Buckland v. Butterfield*, 4 Moore, 447.

(*k*) *Leach v. Thomas*, 7 C. & P. 327.

(*l*) *Elwes v. Maw*, 3 East, 36; 2 Smith's

L. C. 128-160. *Wood v. Hewett*, 8 Q. B. 913.

(*m*) *Buckland v. Butterfield*, 4 Moore, 440; 2 B. & B. 54. *Sleddon v. Cruikshank*, 16 M. & W. 71; 16 Law, J., Exch. 61.

lease (*n*). A door which may be lifted from its hinges, and a sliding fender used to prevent the escape of water from a mill-stream, does not necessarily become part of the freehold (*o*); nor a mooring-pile driven into land for the accommodation of the navigation of a canal or river (*p*).

Agricultural tenants' fixtures made removable by statute.—By 14 & 15 Vict. c. 25, s. 3, it is enacted that if any tenant of a farm or lands shall, with the consent in writing of the landlord, for the time being, at his own cost and expense, erect any farm-building, either detached or otherwise, or put up any other building, engine, or machinery, either for agricultural purposes, or for the purposes of trade and agriculture (which shall not have been erected or put up in pursuance of some obligation in that behalf), such buildings, engines, and machinery shall be the property of the tenant, and shall be removable by him, notwithstanding the same may consist of separate buildings, or that the same or any part thereof may be built in, or permanently fixed to the soil, so as the tenant making any such removal do not in any wise injure the land or buildings belonging to the landlord, or otherwise do put the same in as good plight and condition as the same were in before the erection of anything so removed; but no tenant is to be entitled to remove the thing without first giving to the landlord or his agent one month's previous notice in writing, of his intention so to do; and giving the landlord, or his agent, an opportunity of purchasing the thing proposed to be removed, at a price to be ascertained and determined by two referees, one to be chosen by each party, or by an umpire to be named by such referees.

If a tenant receives from his landlord timber for the purpose of erecting a shed, and uses the timber in the construction of it, he has no right to pull down the building and remove the timber, although he has added materials of his own, and confounded them, in the erection, with those furnished by the landlord (*q*).

Ornamental fixtures.—The ornamental fixtures now held severable and removable by the tenant are, chimney-glasses, pier-glasses, ornamental chimney-pieces, and stoves, tapestry and hangings nailed to the wall, in lieu of ornamental paper or panels (*r*), and ornamental cornices capable of being detached without injury to the building (*s*).

Trade-fixtures.—Amongst the various trade-fixtures held to be removable by the tenant are, soap-boilers' furnaces, fat-vats, coppers,

(*n*) *Grymes v. Boweren*, 4 M. & P. 143; 6 Bing. 437. *Rex v. Olley*, 1 B. & Ad. 161. *Wansbrough v. Maton*, 4 Ad. & E. 884. *Davis v. Jones*, 2 B. & Ald. 165. *Rex v. Londonthorpe*, 6 T. R. 377. *Wiltshire v. Cottrell*, 22 Law, J., Q. B. 181.

(*o*) *Wood v. Hewitt*, 15 Law, J., Q. B.

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(*p*) *Lancaster v. Eve*, 5 C. B., N. S. 720.

(*q*) *Smith v. Render*, 27 Law, J., Exch. 83.

(*r*) *Beck v. Rebow*, 1 P. Wms. 94.

(*s*) *Avery v. Cheslyn*, 3 Ad. & E. 75.

dyeing and brewing vessels, cider-mills, baking-ovens, steam-engines, and salt-pans (t), also machinery, engines, vats, plant and utensils used in trade, however bulky or complex they may be in their construction. The tenant may take them to pieces, and remove them, and put them together again in the same form in some other place. And where a shed or building is a mere accessory to a trade-fixture, such as a shed, or any temporary building, erected merely for the purpose of covering and protecting a steam-engine, or machinery, or trade utensils, from the effect of the weather, it may be removable, together with the trade-fixture to which it belonged, on the ground that "*omne accessorium sequitur suum principale*." But a building is not removable merely because it has been erected for manufacturing or trading purposes, or for the purpose of covering and protecting machinery. If the building is of a substantial character, standing on brick or stone foundations let into the soil, and is constructed so as not to be removable without the entire destruction of the fabric, it cannot be disannexed from the freehold and taken away, although it may be built over a steam-engine, and may contain nothing but steam-machinery, spinning-jennies, drums, and wheels, all of which may be removable, and to all of which it may in a certain sense be accessory (u).

Fixtures removable by local custom and usage.—Things annexed to the freehold are sometimes held removable, in accordance with local custom and usage in particular districts, such as barns and granaries erected on stone pillars, or on pattens, or blocks of timber (x). And if the pillars or pattens merely rest on the ground, and are not attached to foundations sinking into the soil, they are removable without any custom (y).

Abandonment of the right to disannex and remove ornamental and trade-fixtures.—If the tenant has entered into an express covenant to yield up, at the expiration of his term, "all erections and buildings that may be erected," or "all improvements that may be made," upon the demised premises, he cannot afterwards remove trade-erections, or buildings, or trade or ornamental fixtures (z). A covenant in a lease to yield up the demised premises to the lessor at the expiration of the lease, together with all fixtures thereunto belonging, is confined to fixtures which belonged to the demised premises at the time of the execution of the lease, and does not extend to fixtures which were not then in existence; but a covenant to yield up fixtures belonging, or that may belong, to the

(t) 42 Ed. 3, fol. 6, pl. 19; 20 Hen. 7, fol. 13, pl. 24. *Poole's case*, 1 Salk. 368. *Lawton v. Lawton*, 3 Atk. 13. *Penton v. Robert*, 2 East, 90.

(u) *Whitehead v. Bennett*, 27 Law, J., Ch. 474.

(x) 11 Vin. Abr. 154. EXECUTORS U.

pl. 74. *Culling v. Tuffnell*, Bull. N. P. 34.

(y) 2 Smith's, L. C. p. 145, 4th edit.

(z) *Naylor v. Collinge*, 1 Taunt. 19. *Thresher v. E. L. Water Co.*, 2 B. & C. 608; 4 D. & R. 62. *Martyr v. Bradley*, 2 M. & Sc. 25; 9 Bing. 24. *West v. Blakeway*, 3 Sc. N. R. 218.

demised premises, extends to fixtures that are afterwards put up by the tenant (a).

Inability of the tenant to remove fixtures after the expiration of the term of hiring.—Whenever an outgoing tenant is possessed of fixtures which he has a right to remove, he must exercise such right prior to the determination of his tenancy; he cannot, after a formal disclaimer of the title of his landlord, or after he has once quitted the demised premises, re-enter for the purpose of severing and removing fixtures. "After the term, they become a gift in law to him in reversion, and are not removable," unless the tenant, after the expiration of the term, has remained in possession, with the sufferance and permission of the landlord, and actually severs them and removes them during the continuance of his lawful possession, after the expiration of the term. If he holds over wrongfully, he loses his right to sever and remove his fixtures; and if he quits possession, and the tenancy is determined, his right to his fixtures is extinguished, and they become the property of the reversioner (b). If the lease becomes forfeited, and the tenant, whilst he continues in possession after the forfeiture, and before judgment in ejectment has been obtained against him, removes his fixtures, he will, it is apprehended, be entitled to retain the fixtures so removed, as they are not forfeited to the landlord by the forfeiture of the lease (c).

Waste committed by strangers upon land demised to a tenant or lessee.—Every lessee of land, whether for life or years, is liable, under the statute of Gloucester, to a penal action for commissive or wilful waste done on the land in lease, by whomsoever it may be committed. The statute of Gloucester (ante, p. 119) "prohibiteth farmers from doing waste; and yet, if they suffer a stranger to do waste, they shall be charged with it, for it is presumed in law that the farmer may withstand it, 'Et qui non obstat quod obstare potest, facere videtur.' In this case the lessor shall have his action of waste against the lessee, and the lessee his action of trespass against him that did the waste, and so the loss, as reason requireth, in the end shall lie upon the wrong-doer" (d).

License to commit waste.—If a general or partial permission be given to the lessee by the lease to commit waste, he is so far tenant without impeachment of waste. Such permission vests the property of what is the subject of waste in the lessee, so that he avails himself of it during the continuance of his interest. It is so with respect to trees and minerals. Where land was demised for a term of years, with liberty to

(a) *Hitchman v. Walton*, 4 M. & W. 414.

(b) *Lender v. Homewood*, 27 Law, J., C. P. 316. *Ruffey v. Henderson*, 21 ib. Q. B. 49; 17 Q. B. 574. *Heap v. Barton*,

12 C. B. 274.

(c) *Stansfeld v. Mayor of Portsmouth*, 4 C. B., N. S. 131. But see *Storer v. Hunter*, 3 B. & C. 368.

(d) 2 Inst. 146.

the lessee to dig half an acre of brick-earth to a certain depth annually, and the lessee covenanted that if he dug more he would pay an increased rent of 375*l.* per annum per acre, and a stranger dug and took away brick earth, it was held that the lessee was entitled to recover from the stranger the full value of such brick-earth (e).

Right of reversioners to enter upon lands in the possession of their lessees to inspect waste.—The law gives to the lessor, or him who hath the reversion, liberty to enter upon the lands of his lessee, to see if there be waste, to the intent that he may have his action, if there be cause for it; and if the lessee prevents the inspection, he is liable to an action for damages (f).

Injuries to lands and tenements from fire.—The involuntary and unintentional burning of a house, through the negligence of the tenant or his servants, amounts, in contemplation of law, to no more than permissive waste; and for this a tenant-at-will or from year to year is not, as we have seen, responsible to the reversioner (ante, p. 119). Where the Countess of Shrewsbury brought an action against a lawyer of the Temple, and declared that she leased to him a house at will, "et quod ille tam negligenter et improvide custodivit ignem suum quod domus illa combusta fuit," it was held that the action was not maintainable, as it was in effect an action for permissive waste, for which a tenant-at-will was not answerable (g). Every landlord who demises buildings to a tenant must be taken to contemplate all the ordinary risks to which house-property is exposed from fire and the negligence of servants intrusted with fire and candles (h); and if he wishes to be protected from these risks, he must either insure or take from his lessee a covenant to repair and maintain the premises. If he fails to do so, and the premises are destroyed by fire, without any gross or culpable negligence on the part of the tenant, the landlord will have no remedy for the loss. If the fire has been caused by such an amount of gross negligence as to give it the appearance of a wilful act, the party guilty of the misconduct, whether it be the tenant or a stranger to the demise (post, p. 130), will be answerable for commissive waste. And, although a lessee coming into possession of houses and buildings under a contract with a lessor, who might, if he had thought fit, have taken security against damage from fire, is not responsible to such lessor for fire caused by involuntary and unintentional neglect, yet, if a fire, originating in negligence, spreads from the demised premises to other buildings of the lessor, or to the buildings of strangers, the lessee will be responsible for the damage done to them (i).

(e) *Attersoll v. Stevens*, 1 Taunt. 183.

(f) *Hunt v. Downman*, Cro. Jac. 478.

(g) *Countess of Shrewsbury v. Crompton*, 5 Co. 13b; Cro. Eliz. 777; Tindal, C. J., 4 M. & Sc. 263. *Horsefall v. Mather*,

Holt, N. P. C. 9.

(h) *Fortuna autem ignis, vel hujusmodi eventus inopinati, omnes tenentes excusat.* Fleta, lib. 1. cap. 12, s. 20.

(i) *Panton v. Isham*, 3 Lev. 350.

Injuries to lands and tenements from fire, and dangerous things set in motion by neighbours and strangers.—Every person who puts a dangerous thing in motion which causes injury to another, is in general responsible for the mischief it occasions (*j*). Where a man shooting with a gun at a fowl hit his own house and set it on fire, and the fire spread to the house of his neighbour and destroyed it, it was held that the firer of the gun was responsible for the damage, although the fire was occasioned rather by an accident or misadventure than by negligence (*k*).

Every person who lights a fire is clothed by the common law with a heavy responsibility to his neighbours as regards the safe keeping of such fire. By the ancient custom of the realm, “quilibet homo et fœmina ignem suum, die et nocte, salve et secure custodire teneatur, ne pro defectu debitæ custodiæ ignis hujusmodi damnum aliquod vicinis suis eveniat” (*l*). It was formerly holden that if a fire broke out accidentally in a man's house, and raged to that degree as to burn his neighbour's house, that he in whose house the fire first happened was liable to an action on the case on this general custom of the realm (*m*). In Rolle's Abridgement it is said : “If my fire by misfortune burns the goods of another man, he shall have an action on the case against me. If the fire lights suddenly on my house, I knowing nothing of it, and burn my goods, and also the house of my neighbour, my neighbour shall have an action on the case against me. If my servant puts a candle or other fire in a place in my house, and it falls and burns all my house and the house of my neighbour, action on the case lies against me by him ; and the law is the same if my guest should do it, or a person who enters my house with my leave or knowledge” (*n*). “But if a man out of my house, against my will, puts fire into the straw of my house or elsewhere, whereby my house is burnt, and the houses of my neighbours are burnt, of that I shall not be bound to answer to them, &c., for that cannot be said to be by malfeasance on my part, but against my will” (*o*).

But although the master of a house or the raiser of a fire was clothed with this extensive responsibility, as regarded the lighting, safe-keeping, and spreading of such fire, yet if the fire spread by reason of the act of God, or from some superior cause which could not have been prevented, controlled, or resisted by human agency, the master of the house or the lighter of the fire was held excused. Thus, where the defendant's servant kindled a fire in the defendant's field in the way of husbandry, and in the

(*j*) Grose, J., 3 East, 600.

(*k*) Anon. Cro. Eliz. 10.

(*l*) Rastr. Entr. p. 18. *Panton v. Isham*, 3 Lev. 356.

(*m*) Bac. Abr., Actions on the Case F.,

p. 104.

(*n*) 1 Roll. Abr., ACTION SUR CASE B. Danvers Abr. 10.

(*o*) Markham, J., *Beaulieu v. Finglam*, 2 H. 4, fol. 18, pl. 6.

ordinary course of his employment as a farm-servant, and the wind drove the fire into an adjoining heath and coppice of the plaintiff, and set it on fire, it was held that if the defendant could have shown that the spreading of the fire had been occasioned by a sudden storm, which could not have been foreseen, guarded against, or controlled by human agency, that would be good evidence to excuse the defendant (*p*). To put the law on a proper footing, by rendering the party responsible only on proof that the fire was occasioned by the actual negligence of himself or his servant (*q*), it was enacted by the statute 6 Anne, c. 31, ss. 6, 7, that no action or suit shall be maintained against any person in whose house or chamber any fire shall *accidentally* begin, or any recompense be made by such person for any damage occasioned thereby; and subsequent statutes (12 Geo. 3, c. 73, s. 37; 14 Geo. 3, c. 78, s. 86) extend the protection to all persons in whose stable, barn, or other building, or on whose ESTATE any fire shall *accidentally* begin; but no contract between landlord and tenant is to be defeated or made void by the statute.

It was thought for a long time that the word "accidental" was employed in these statutes in contradistinction to wilful, and that the same fire might be said to begin accidentally, and yet be the result of a certain amount of negligence; but it has been recently held that these statutes refer only to fires produced by mere chance, or which are incapable of being traced to any cause, and so stand opposed to the negligence of either servants or masters, and that they do not, consequently, protect parties from the ordinary common-law responsibility in respect of fires occasioned by negligence (*r*). Thus, where the occupier of a meadow adjoining some cottages belonging to the plaintiff stacked a hay-rick on the extremity of the meadow in too green a condition, close to the plaintiff's cottages, and the hay smoked, and steamed, and exhibited unequivocal symptoms of approaching combustion, and the defendant was frequently warned of the danger of the stack's taking fire, and said that he would "chance it," but he ultimately caused a hole to be cut through the centre of the rick, which, unfortunately, hastened the catastrophe it was intended to avert, and the hay-stack caught fire, and the fire spread to the barn and stables of the defendant, and thence to the plaintiff's cottages, and totally consumed them, it was held that the defendant was responsible for the destruction of the cottages, and that, in cases of this sort, "it is for the jury to say, whether or not, under the circumstances, the party has conducted himself

(*p*) *Turbervil v. Stamp*, 1 Salk. 13; 1 Ld. Raym. 264.

(*q*) *Ld. Vanterbury v. the Queen*, 1 Ph. C. C. 318; 13 Law, J., Ch. 284.

(*r*) *Filliter v. Phippard*, 11 Q. B. 357. *Canterbury (Vinct.) v. Att.-Gen.* 1 Phil. Ch. c. 328.

with such a degree of care and caution as might be looked for in a prudent man" (s).

It has been held, also, that these statutes respecting accidental fires do not apply where the fire originates in the use of a dangerous engine or instrument, knowingly used by the owner of the land or estate on which the fire breaks out (t); so that if the owners of manufactories and steam-engines are guilty of any negligence or carelessness in the management of their furnaces and chimneys, and by reason thereof sparks escape and are blown on to the adjoining buildings, the owners of the furnace will be responsible for the damage done. It has been held, moreover, that a fire designedly lighted by the defendant or by his orders, on his own estate, and which afterwards spreads, and causes damage to the plaintiff, is not a fire which "accidentally begins" within the meaning of the statute; so that if a person lights, or causes his servants to light, fires on his land for the purpose of burning weeds and rubbish, and the fire spreads to and destroys the hedges and woods or cornfields of the adjoining landed proprietor, the lighter of the fire will be responsible for the damage (u). But a fire may be knowingly and designedly lighted in the first instance, and yet may fairly be said to "accidentally begin" the moment that, through some sudden and unexpected wind, the fire spreads, or sparks and fragments of fire are blown into the air, and get beyond the control of the party who has lighted and watched the fire (ante, p. 130).

Fire spreading from blast-furnaces and steam-engines.—Wherever it is practicable to adopt precautions that will render damage by fire from a furnace "next to impossible," a failure to adopt those precautions will be negligence. Where a spark of fire from the chimney of a locomotive engine on a railroad fell on the thatch of a cart-lodge, and set it on fire, and the fire communicated to several other farm-buildings, and totally destroyed them, it was held that the very occurrence of the disaster was, *primum facie*, proof of negligence on the part of a company and their servants, having the management of their engine; rendering it incumbent on them to show that every possible precaution had been taken to prevent the escape of sparks (r).

Fire spreading from railways to the adjoining property.—If railway companies allow quantities of long, dead grass, or any other combustible material, to accumulate along their railway, and the combustible matter is ignited from lighted coals or sparks escaping from their locomotive engines,

(s) *Vaughan v. Menlove*, 4 Sc. 251; 3 Bing. N. C. 468.

(t) *Vaughan v. Taff Vale Rail. Co.*, 3 H. & N. 743; 28 Law, J., Exch. 41; 32 Law, T. R., Exch. 168.

(u) *Filliter v. Phippard*, 11 Q. B. 347. *Turbervil v. Stamp*, 1 Salk. 13.

(x) *Piggot v. Eastern Co. Rail. Co.*, 3 C. B. 229. *Aldridge v. Gl. West. Rail. Co.*, 3 M. & Gr. 515.

and the fire spreads from the railway to the adjoining coppices and fires them, the railway company will be responsible for the damage done; for such a fire is not a fire which accidentally begins on their estate, but is a fire caused by their negligence, in not keeping the railway free from combustible materials likely to be ignited by their furnaces, and to cause damage to their neighbours (*y*). They may be expressly authorized by statute to use locomotive furnaces of a dangerous character, but no statute can exempt them from the consequences of negligence in the management of their railways, or authorize them to throw coals of fire on the adjoining property.

Fires occasioned by the negligence of servants.—The statutes 6 Anne, c. 31, s. 8, and 12 Geo. 3, c. 73, s. 35, further enact, that if any menial or other servant, through negligence or carelessness, shall fire, or cause to be fired, any dwelling-house or out-house, or houses, or other buildings, such servant being thereof lawfully convicted by the oath of one or more credible witness or witnesses, made before two or more justices of the peace, shall forfeit and pay 100*l.* to the churchwardens or overseers of the parish, to be distributed amongst the sufferers by such fire, or be committed to gaol and kept to hard labour for eighteen months. This enactment, making the servant punishable for fires resulting from his negligence, does not exempt the master from responsibility for the negligent acts of the servant whilst carrying into execution the master's orders (*z*).

Amongst the Romans, where fire was little used, and candles were unknown, it was considered that damage from fire seldom occurred without imprudence or negligence; and those through whose neglect, however slight, a fire occurred, were held answerable for the damage done by it (*a*).

Injuries from gunpowder and explosive substances—Explosions of gas.—Whoever introduces gunpowder or explosive materials into a building is responsible for damage occasioned by the introduction of such dangerous substances. If a person mixes things together, which alone are perfectly innocent, but which are liable to explode on coming into contact, he is responsible for the consequences; and if an explosion ensues he must make good the damage (*b*). Every tenant of a house is responsible for not taking care that the stop-cocks for regulating the supply of gas to a house are properly turned; and if these stop-cocks are negligently left open by the tenant or servants when the gas-lights are not burning,

(*y*) *Vaughan v. Taff Vale Rail. Co.*, 3 468.
H. & N. 743; 28 Law, J., Exch. 41.

(*z*) *Vaughan v. Menlove*, 3 Bing. N. C.

(*a*) Domat. liv. 2, tit. 8, s. 4.

(*b*) Tindal, C. J., 4 Sc. 252.

and an explosion ensues, and injures the house, the tenant will be responsible for the injury. But if a thief enters the house in the absence of the tenant, and cuts and carries away a gas-pipe without the knowledge of the tenant, or against his will, the latter is not then responsible for the resulting damage. When the entry of gas into a house is under the control of the occupants of the house, the gas company supplying the gas is not bound, on receiving notice that no more gas will be required, to stop the supply from the outside by putting on an outer stop-cock, or cutting off the communication between the gas-pipes in the interior of the house and the main in the street (c).

SECTION II.

OF ACTIONS FOR INJURIES TO REALTY FROM WASTE, NEGLIGENCE, AND FIRE.

Actions by owners of insured premises.—The right of the owner of real property, which has been damaged or destroyed by fire, caused by rioters or by negligence, to sue the wrong-doer for damages, is not affected by the fact of his having insured the property, and received from an insurance company full indemnity for his loss (d), but he sues in the character of a trustee for the insurer, and is bound to hand over the damages he recovers to the latter. And an insurer, who has paid the loss, is entitled to sue in the name of the insured, for the purpose of recovering full compensation from the wrong-doer (e).

Parties to the action.—The several rights of action of the landlord and occupier of premises which have been injured by the wrongful act of the defendant have already been pointed out (f). In cases of injuries from fire caused by the negligence of a neighbour, who has carelessly lighted a fire on his own land, which has spread to a demised tenement and injured it (ante, p. 130), the landlord is entitled to sue for the damage done to his inheritance, and the tenant for the injury to his possession and occupation (g). We have already seen that, when several persons have a joint

(c) *Holden v. Liv. Gas Co.*, 3 C. B. 14 ;
15 Law, J., C. P. 304.

(d) *Fates v. Whyte*, 5 Sc. 640 ; 4 Bing.
N. C. 272.

(e) *Randal v. Cockran*, 1 Ves. sen. 97 ;

post, ch. 21, s. 1.

(f) Ante, pp. 63, 105 ; and post, ch. 19.

(g) *Panton v. Isham*, 3 Lev. 359 ; 1
Salk. 19. Ante, p. 105.

interest in the property, as occupiers or reversioners, they ought all to be made plaintiffs in an action for an injury to the property (*h*); and that when several persons have been jointly engaged in the doing of the wrongful act, the plaintiff may sue one or more of them at his election (*i*).

Declarations for waste should set forth that the defendant was in the possession and occupation of a certain messuage or tenement, or dwelling-house and land, as tenant thereof; that the reversion of the said messuage, &c. was in the plaintiff; and that the defendant, whilst he was in possession of the said messuage, tenement, or land, wrongfully pulled down and prostrated certain buildings, walls, or fences belonging to the said messuage or tenement, &c., or damaged and destroyed certain partitions therein, or wrongfully removed or altered the doorways thereof, or wrongfully detached and removed therefrom certain furnaces, stoves, &c., or certain machinery attached thereto, and forming part of the soil and freehold thereof, or wrongfully cut down certain timber-trees growing thereon, or dug out and carried away therefrom soil, gravel, and stone, as the case may be, averring that, by means of such wrongful act of the defendant, the plaintiff is greatly injured in his reversionary estate and interest in the demised premises, and claims damages, specifying the amount claimed (*k*). If the tenant has severed and removed things attached to the freehold; if he has dug up and carried away virgin soil, stone, or gravel, without the license of the landlord or reversioner, or has severed and removed landlord's fixtures, the things so severed forthwith vest in the landlord as chattels, and the latter may also declare either for a trespass or for a conversion of the property (*l*).

Declarations upon the custom of the realm for the negligent keeping of a fire should allege that every one who has lighted a fire ought to keep such fire, so that by default of proper care thereof no damage should happen to another; that the defendant, by his servant, lighted a fire on the defendant's land, and so negligently kept such fire that it extended from the defendant's land to an adjoining dwelling-house, barn, and stable of the plaintiff, and wholly destroyed them (*m*); or it may be alleged that the plaintiff was possessed of a certain close of land, and of certain trees, hedges, and fences standing and being thereon, closely adjoining a certain other close in the possession and occupation of the defendant, and that the defendant wrongfully lighted a fire in the open air on his said close, closely adjoining the close of the plaintiff, at a time when, by reason of

(*h*) Ante, pp. 10, 106; and post, ch. 19.

(*i*) Ante, pp. 65, 108; and post, ch. 19.

(*k*) *Martyr v. Bradley*, 9 Bing. 24.

Young v. Spencer, 10 B. & C. 145. *Martyn v. Gilham*, 7 Ad. & E. 540; 2 Wm.

Saund. 252.

(*l*) *Higgon v. Mortimer*, 6 C. & P. 616; post, ch. 6, s. 2.

(*m*) *Panton v. Isham*, 3 Lev. 359.

the state of the wind and weather, it was highly dangerous to light a fire, and that through the negligence and carelessness of the defendant and his servants in that behalf, the said fire extended itself from the close of the defendant to the close of the plaintiff, and burnt, damaged, and destroyed the said trees, hedges, and fences, of the plaintiff, and the plaintiff was obliged to expend divers sums of money in extinguishing the said fire, &c. (n).

A good cause of action is disclosed by a declaration alleging that the plaintiff was possessed of certain farm-buildings and stacks of corn standing in a close in the occupation of the plaintiff, closely adjoining a certain other close in the occupation of the defendant, and that the defendant placed a stack of hay on his said close, which heated and smoked, and gave out a strong smell, indicating that the said hay-stack was in danger of taking fire, of which the defendant then had notice, and that the defendant, well knowing the dangerous condition of the hay-stack, nevertheless kept and continued it on his said close, and knowingly caused it to be a source of danger to the adjoining property of the plaintiff, although he could have removed it, or prevented it from being dangerous; and that by reason of the defendant's default and negligence in the premises, the said hay-stack ignited and burst into flame, and set fire to the adjoining farm-buildings of the plaintiff, and entirely destroyed them (o).

A good cause of action is likewise disclosed by a declaration alleging that the plaintiff was possessed of a stack of beans standing on land of the plaintiff, adjoining a certain railway in the use and occupation of the defendants, and that the defendants were also possessed of a certain locomotive steam-engine and furnace, with a fire burning therein, which was propelled along the railway by the servants of the defendants near the said bean-stack of the plaintiff; and that the defendants, by their servants, so carelessly and negligently kept and managed the said fire, that the sparks therefrom were cast upon the said bean-stack of the plaintiff, and by means thereof the said bean-stack was ignited and wholly consumed (p).

Pleas.—The plea of not guilty, and the evidence admissible thereunder, and special pleas in actions for waste, &c., are governed by the same rules as those previously set forth in actions for infringements upon territorial and incorporeal rights (q).

Evidence at the trial.—*Proof on the part of the plaintiff* in actions for waste must be directed to the establishment of the material facts alleged

(n) *Fillier v. Phippard*, 11 Q. B. 348.

(o) *Vaughan v. Menlove*, 3 Bing. N. C. 468.

(p) *Aldridge v. Gt. West.* 3 M. & Gr.

516. *Piggot v. East. Co. Rail. Co.*, 3 C. B. 220. *Vaughan v. Taff Vale Rail. Co.*, 3 H. & N. 743.

(q) *Ante*, pp. 13, 68; and post, ch. 20.

in the declaration, *i. e.* the defendant's tenancy of the land on which the waste was committed, the plaintiff's reversionary interest therein, the nature of the grievance, and the permanent injury thereby done to the inheritance, or to the plaintiff's proprietary rights as reversioner (*ante*, pp. 184, 185). If the action is brought for permissive waste, the plaintiff must prove that the defendant is tenant for life, or that he has a permanent interest in the property permitted by him to go to waste and ruin (*ante*, pp. 119, 120); but if it is for commissive waste, the nature and duration of the defendant's interest in the property is wholly immaterial. If it be proved that the tenant left windows and doors open which ought to have been kept closed against storm and rain, or that panes of glass were broken, and that he allowed the windows to remain without glass, so that the rain, frost, and damp penetrated the building, and rotted the internal timbers and woodwork thereof, to the lasting damage of the inheritance, there will be evidence of commissive waste. If the plaintiff complains of the removal of doors and partitions in the house, he must show that the alterations made were of a permanent character, making a real change in the form and arrangement of the building, or that they deteriorated the property (*ante*, pp. 120, 121). If the cause of action is founded on the removal by the tenant of things attached to the freehold, it must be shown that the removal was wrongful; either on the ground that the things removed never did belong, or ceased to belong, to the defendant, or that they had become forfeited to the plaintiff (*ante*, pp. 122–127). If the plaintiff sues for damage from fire, he must show that the fire was lighted by the defendant or his servants, or that a fire was burning on the defendant's estate, and that it was so negligently managed, or was lighted so carelessly, that it extended to the plaintiff's buildings and destroyed them. It is not necessary to prove the legal duty to take care of a fire. If the action is brought by a lessor, it may, as we have seen, be defeated by proof of the tenancy between the plaintiff and the defendant (*ante*, p. 128).

Damages recoverable in respect of the severance and sale of fixtures.—Where fixtures have been unlawfully detached from the freehold and sold by auction, the measure of damages in an action against a wrong-doer for the seizure and removal of the fixtures is the value of the fixtures, as between an outgoing and incoming tenant, in addition to compensation for any intentional wrong, injury, or insult involved in the act of removal (*r*), or for any trespass that may have been committed in removing them.

Assessment of damages.—We have already seen that the damages in actions for injuries to real property must be assessed with reference to the

several interests of the owners and occupiers, and be apportioned to each in respect of the injury sustained by each, and that the satisfaction made to one is no bar to an action brought by the other (*ante*, pp. 15, 116). Where, therefore, a house has been burned down, or destroyed by culpable negligence, and there are several parties interested in the property, viz. tenant for life, tenant in tail, and reversioner in fee, the tenant for life can recover only such damages as are commensurate with his life-estate (*s*). If a house demised to a tenant has been set on fire, or thrown down through the negligence of a neighbour, the damages are apportionable between the landlord and tenant. The tenant is entitled to recover in respect of the value of his possessory interest and unexpired term in the premises, and the landlord in respect of the injury to his reversion (*t*). But if the tenant is bound by covenant to keep the house in repair, the substantial injury would then accrue to the tenant, and the tenant would be entitled to recover the cost of rebuilding the house, deducting the difference in value between old materials and new (*u*). The tenant, moreover, would be entitled to damages in respect of the loss he has sustained in being obliged to seek out and pay for another residence; but he could not recover the full value of the house (*x*).

When the action is brought for a breach of duty by the defendant in omitting or neglecting to restore or rebuild a house which the defendant has undertaken to maintain and keep up, and which has been accidentally burnt or destroyed, the measure of damages is not the cost of rebuilding the house. In such a case, the plaintiff can only recover the loss he has sustained by the actual deterioration of his property. And if the new house, when rebuilt, will be much more valuable to the plaintiff than the old house that was burnt or destroyed, the defendant is entitled to the benefit of the deduction of the increased value from the cost of the rebuilding (*y*).

The plaintiff's right to recover damages from the wrong-doer, in respect of the injury he has sustained, is not affected, as we have seen, by the fact of his having insured the property and been indemnified for the loss (*z*); but he cannot, as we shall presently see, recover a double satisfaction, but is bound to pay over to the underwriter of the policy the damages he recovers from the wrong-doer (*a*).

Damages recoverable from a tenant who obstructs the reversioner in the

(*s*) *Evelyn v. Raddish*, Holt, 543.

(*t*) *Panton v. Isham*, 3 Lev. 359; 1 Salk. 10.

(*u*) *Lukin v. Godsall*, 2 Peake, 15; post, ch. 13, s. 1.

(*x*) *Hosking v. Phillips*, 3 Exch. 182.

(*y*) *Yates v. Dunster*, 11 Exch. 17; 24 Law, J., Exch. 220. *Lukin v. Godsall*, 2 Peake, 15.

(*z*) *Clark v. Blything*, 2 B. & C. 254; ante, p. 133.

(*a*) Post, ch. 21, s. 1.

exercise of his right to enter upon the demised premises to inspect waste.—We have already seen that the law gives to the lessor, or him who hath the reversion, liberty to enter upon the lands of his lessee, to see if there be waste, to the intent that he may have his action, if there be cause for it; and, therefore, if the lessee prevents the inspection, substantial damages may be recovered from him by reason of the infringement of the lessor's right, although no waste has actually been committed or damage done (b).

(b) *Hunt v. Downman*, Cro. Jac. 478.

CHAPTER V.

OF TRESPASS UPON REAL PROPERTY—TITLE TO CORPOREAL
AND INCORPOREAL HEREDITAMENTS.

SECTION I.—*Of trespass upon lands and tenements.*—What amounts to a trespass—Trespasses on land where the surface and subsoil constitute separate freeholds—Forcible entry and detainer—Trespasses by cattle from want of fences and from defective fences—Who is bound to fence and repair fences—Trespasses on highways—Continuing trespasses.

SECTION II.—*Of the title to land, fences, and boundary-walls.*—Trial of title to land in actions for a trespass—Title to realty from twenty years' adverse

possession—Title to the sea-shore and the adjoining waste land—Title to the soil of publick and private ways, and the adjoining uninclosed waste land—Title to the soil of towing-paths—Title to boundary-walls, trees and bushes, hedges and ditches.

SECTION III.—*Of actions for trespasses upon lands and tenements.*—Actions for damage done by rioters—Parties to actions for trespasses—Pleadings, defences, and evidence—Damages recoverable.

SECTION I.

OF TRESPASSES UPON LANDS AND TENEMENTS.

What amounts to a trespass.—The word trespass, derived from the French word *trespasser*, signifies to go beyond what is right, and every injurious act, not amounting to treason or felony, is, in the large sense of the word, a trespass. Thus, to enter another's house or close, to pour water out of a pail into another man's yard, or to fix a spout so as to discharge water upon another's land, or to suffer filth to ooze through a boundary-wall and to run over another's close or yard without his leave or permission, is a trespass, unless a right of way over the adjoining close, or a right to discharge water upon it, or a right for the passage of waste-water and refuse through it, has been gained (c).

Every trespass upon land is, in legal parlance, an injury to the land, although it consists merely in the act of walking over it, and no damage is done to the soil or grass. Every injury to the possession of the occupier is, in principle, an injury to the property; and, therefore, if a man is

(c) *Reynolds v. Clarke*, 2 Ld. Raym. 1309.

unlawfully turned out of his dwelling-house, that amounts, in point of law, to an injury to the dwelling-house (*d*).

Where an action was brought for trespassing on a close and treading down the grass, and the defendant pleaded that he had land lying next the said close, and upon it a hedge of thorns, and he cut the thorns, and they, *ipso invito*, fell upon the plaintiff's land, and the defendant took them off as soon as he could, and the plaintiff demurred, it was adjudged for the plaintiff: for though a man doth a lawful thing, yet if any damage do hereby befall another, he shall answer for it, if he could have avoided it (*e*). If a railway company, which is authorized by statute to run locomotive furnaces along its line of railway, projects burning coals upon the adjoining land of other proprietors, this is a trespass, and the company is responsible for the damage done by the fire; for no act of parliament authorizes them to project coals of fire upon the land of their neighbours (*f*). If, without negligence on their part, a spark flies into the air from the chimney, and is carried by the wind upon the adjoining land, this is not a trespass.

Trespasses in cases where the surface and subsoil of land constitute separate freeholds.—If it appears that the plaintiff has parted with the vesture and herbage, and right to the surface of the land, and retains only an interest in the subsoil, he cannot maintain an action for trespasses upon the surface (*g*); but if any person digs holes through the surface, and trespasses upon the subsoil, he is then entitled to an action for damages (*h*). If land is demised generally to a lessee, who enters under the lease, he is in possession of both the surface and the minerals; but he has no right to work the minerals without the license of the lessor, neither can the lessor work them without the permission of the lessee. If the adjoining occupier sinks a mine in his own land, and makes lateral excavations, trespassing upon the minerals of the lessee without disturbing the surface of the land in his occupation, the lessee may, nevertheless, maintain an action for the trespass and injury to his possessory interest, and the lessor may maintain an action for the injury to his reversionary estate. If the surface and minerals have been discovered in title, and have become separate tenements, then the grantee or owner of the minerals is the only person entitled to sue in respect of trespasses upon them (*i*).

Forcible entry and detainer.—At common law, if a man had a right to the possession of land, and a right to enter thereon, he might enter and obtain possession with force and arms, and retain possession by force, which gave an opportunity, we are told, to powerful men to enter upon land

(*d*) *Meriton v. Coombes*, 10 Law, J., C. P. 380.

(*e*) Mich. 6 K. 1, 7a, pl. 18.

(*f*) *Vaughan v. Taff Vale Rail. Co.*, 3 H. & N. 743; 28 Law, J., Exch. 41.

(*g*) *Cox v. Mousley*, 5 C. B. 540.

(*h*) *Cox v. Glue*, ib. 540, 553; 17 Law, J., C. P. 162.

(*i*) *Keyse v. Powell*, 2 Ell. & Bl. 144; 22 Law, J., Q. B. 305. *Lewis v. Branthwaite*, 2 B. & Ad. 437.

under pretence of feigned titles, and forcibly eject their weaker brethren (*k*), and therefore it was enacted (5 R. 2, c. 7), "That none thenceforth make entry into any lands and tenements but in cases where entry is given by the law, and in that case not with strong hand, nor with multitude of people, but only in a peaceable and easy manner" (*l*). A mere trespasser cannot, by the very act of trespass, immediately, and without acquiescence on the part of the landowner, become possessed of the land upon which he has trespassed, and which he tortiously holds, and he may consequently be expelled by main force (*m*); but if he is allowed to continue on the land, and the landowner sleeps upon his rights, and makes no effort to remove him, he will gain a possession, wrongful though it be, and cannot be forcibly ejected. A mere intruder upon land, who has been allowed to run up a hut and occupy it, has no right to the hut or to the possession thereof, and the landlord may enter and pull down the hut about the ears of the occupants and remove the materials (*n*). The rightful owner cannot, in any case, when he has a right of entry, be made responsible in damages for a trespass upon his own land, for he is no trespasser if he has a right to go upon it (*n*); but if he assaults and expels persons who, having originally come into possession lawfully, continue to hold unlawfully, after their title to occupy has been determined, he may be made responsible for the assault, and be indicted for a forcible entry (*o*). Having, however, a right to enter upon his own land, he may do so peaceably; and if his entry is resisted by force, he may, it seems, repel force by force (*o*).

"Where a breach of the peace," observes Parke, B., "is committed by a freeholder, who, in order to get into possession of his land, assaults a person wrongfully holding possession of it against his will, although the freeholder may be responsible to the public, in the shape of an indictment for a forcible entry, he is not liable to the other party. It is a perfectly good justification to say that the plaintiff was in possession of the land against the will of the defendant, who was owner, and that the defendant entered upon it accordingly" (*p*).

Of trespasses by cattle from want of fences and from defective fences—Who is bound to fence and repair fences.—Whenever two persons have adjoining fields, and no hedge or fence between them, each must take care that his own beasts do not trespass on his neighbour (*q*), unless

(*k*) Bac. Abr. FORCIBLE ENTRY.

(*l*) As to recovery of possession by persons forcibly expelled, see 8 H. 6, c. 9; 31 Eliz. c. 11; 21 Jac. 1, c. 15.

(*m*) *Browne v. Dawson*, 12 Ad. & E. 629.

(*n*) *Davison v. Wilson*, 11 Q. B. 800; 17 Law, J., Q. B. 196.

(*o*) *Newton v. Harland*, 1 Sc. N. R. 492.

(*p*) *Harvey v. Bridges*, 14 M. & W. 442; 1 Exch. 261. *Davison v. Wilson*, 11 Q. B. 800. *Meriton v. Coombes*, 19 Law, J., C. P., 336.

(*q*) Roll. Abr. 105; 2 Roll. Abr. 565, pl. 7; *Dyer*, 372b.

one proprietor has acquired a right or title, by grant or prescription, to have the boundary-fence between his close and that of the adjoining proprietor maintained and repaired at the expense of such adjoining proprietor (ante, p. 46). "Every man must use his own land so as thereby not to hurt another; and as, of common right, one is bound to keep his cattle from trespassing on his neighbour, so he is bound to use anything that is his so as not to hurt another by such user. If, therefore, a vendor sells a piece of pasture lying open to another piece of pasture of which he is possessed, the vendee is bound to keep his cattle from running into the vendor's piece; so of dung or anything else" (r). If a landowner, who has land abutting upon a highway, neglects to fence the land from the highway, so that cattle stray from the highroad and injure his crops, he cannot immediately distrain the beasts' damage feasant, or treat the owner of the beasts as a trespasser, but must either drive them out himself, or allow a reasonable time to the drovers in charge of them to get them out of the land (s). If one landowner is bound to maintain and repair a fence for the benefit of the adjoining landowner (ante, pp. 46, 47), and cattle escape out of the land of the latter, and trespass upon the land of the party who ought to have kept up the fence, it is no excuse that the fences were out of repair, if the beasts were trespassers in the place from whence they came. If it be a close, the owner of the cattle must show an interest or a right to put them there. If it be a way, he must show that he was lawfully using the way (t).

Of trespasses upon highways set out and dedicated to the publick by private proprietors.—By setting out a highway, and dedicating it to the use of the publick, the owner of the land over which the right of way is granted does not thereby part with the property in the soil. The landlord, in such a case, has full dominion and control over the land subject to the easement, and may recover it in ejectment (u), or bring an action for a trespass against any person who deposits stones or rubbish upon the soil, or constructs a bridge over or upon any part of the highway, or infringes in anywise upon the ordinary proprietary rights of the owner of the soil (x). And the same rule prevails with regard to land over which any other privilege or easement has been granted to particular individuals, or to the publick at large, such as a stall in a market (y).

Of continuing trespasses.—If a man throws a heap of stones, or builds

(r) *Tenant v. Goldwin*, 6 Mod. 314.

(s) *Goodwin v. Cheveley*, 4 H. & N. 681; 28 Law. J., Exch. 298; 7 Week Rep. Exch. 630.

(t) *Dovaston v. Payne*, 2 H. Bl. 531; Anon. 3, Wils. 126.

(u) *Goodtitle v. Alker*, 1 Burr. 133.

(x) 3 Com. Deg. CHIMIN. (A. 2) 27. *Lade v. Shepherd*, 2 Str. 1004. *Every v. Smith*, 26 Law. J., Exch. 345.

(y) *Mayor of Northampton v. Ward*, 1 Wils. 114.

a wall, or plants posts or rails on his neighbour's land, and there leaves them, an action will lie against him for the trespass, and the right to sue will continue from day to day, till the incumbrance is removed. An action may be brought for the original trespass in placing the incumbrance on the land, and another action for continuing the thing so erected for the recovery of damages in the first action, by way of satisfaction for the wrong, does not operate as a purchase of the right to continue the injury (z).

SECTION II.

OF THE TITLE TO LAND, FENCES, AND BOUNDARY-WALLS.

Trial of title to lands and tenements in an action for a trespass.—If the defendant, in an action for a trespass committed by him upon the land or messuage of the plaintiff, pleads that the close or land in which the trespass was committed was the soil and freehold of the defendant, the plaintiff's title to the property is in issue, and also his right of possession (post, s. 3), and the defendant may, under this plea, bring forward evidence to show that he had a right to enter upon the close because it is his freehold, or because it has been demised to him, or because he had obtained an indefeasible title under the statute for the limitation of actions and suits relating to real property.

Of the title to real property.—By 3 & 4 Wm. 4, c. 27, s. 2, entitled "An Act for the Limitation of Actions and Suits relating to Real Property," it is enacted, that no person shall make an entry or distress, or bring an action to recover any land or rent, but within TWENTY years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims; or if such right shall not have accrued to some person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same (a).

When the right is deemed to have accrued—*Dispossession and discontinuance of possession causing the period of limitation to begin to run.*—By 3 & 4 Wm. 4, c. 27, s. 3, it is further enacted, that when the person claiming such land or rent, or some person through whom he claims,

(z) *Holmes v. Wilson*, 10 Ad. & E. 503.
Bowyer v. Cook, 4 C. B. 236.

(a) *Brassington v. Llewellyn*, 27 Law,
 J., Exch. 297.

shall, in respect of the estate or interest claimed, have been in possession or receipt of the profits of such land, or in receipt of such rent, and shall, while entitled thereto, have been dispossessed, or have discontinued such possession or receipt, then the right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received. The word discontinuance of possession in this section means an abandonment of possession by one person, followed by the actual possession of another person; for if no one succeed to the possession vacated or abandoned, there could be no one in whose favour, or for whose protection, the act would operate. To constitute discontinuance, there must be both dereliction by the person who has the right and actual possession, whether adverse or not, to be protected (*b*). Therefore, where the owner of the fee simple of a close, with a stratum of coal and other minerals under it, has conveyed the surface to one under whom the plaintiff claims, reserving the minerals, and a right of entry to get them, to another under whom the defendant claims, the title and right of entry of the grantees of the mines is not barred by simple non-user for more than forty years, no other person having worked or been in possession of the mines (*c*).

Accrual of the right on the death of parties in possession—Commencement of the period of limitation.—It is further enacted (s. 3), that when the person claiming such land or rent shall claim the estate or interest of some deceased person, who shall have continued in such possession or receipt in respect of the same estate or interest, until the time of his death, and shall have been the last person entitled to such estate or interest who shall have been in such possession or receipt, then the right shall be deemed to have first accrued at the time of such death.

Accrual of the right under a deed—Commencement of the period of limitation.—It is further enacted (s. 3), that when the person claiming such land or rent shall claim in respect of an estate or interest in possession granted, appointed, or otherwise assured, by any instrument other than a will to him or some other person through whom he claims, by a person being in respect of the same estate or interest in the possession or receipt of the profits of the land, or in receipt of the rent, and no person entitled under such instrument shall have been in possession or receipt, then the right shall be deemed to have first accrued at the time at which the person so claiming, or the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument.

(*b*) Blackburne, C. J., *M'Donnell v. M'Kinty*, 10 Irish Law Rep. 516.

(*c*) *Smith v. Lloyd*, 23 Law, J., Exch. 194; 9 Exch. 571.

Reversionary estates.—Forfeitures.—Accrual of the right.—Commencement of the period of limitation.—By s. 3, it is further enacted, that when the estate or interest claimed shall have been an estate or interest in reversion or remainder, or other future estate or interest, and no person shall have obtained the possession or receipt of the profits of such land, or the receipt of such rent in respect of such estate or interest, then such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession; and when the person claiming such land or rent, or the person through whom he claims, shall have become entitled by reason of any forfeiture, or breach of condition, then such right shall be deemed to have first accrued when such forfeiture was incurred or such condition was broken. Provision is made (ss. 4, 5) for giving new rights of entry, &c. to remaindermen and reversioners in certain contingencies.

Conversion of defeasible tenancies-at-will into an indefeasible title.—Possession of land by a cestui que trust.—It is further enacted (s. 7), that when any person shall be in possession or receipt of the profits of land or rent, as tenant-at-will, the right of the person entitled subject thereto, or of the person through whom he claims to make entry or distress, or bring action to recover such land or rent, shall be deemed to have first accrued either at the determination of such tenancy, or at the expiration of one year next after the commencement thereof, at which time such tenancy shall be deemed to have determined (*d*). But no mortgagor or cestui que trust is to be deemed to be a tenant-at-will to his mortgagee or trustee within the meaning of that clause. This proviso is applicable only to cases of express and declared trusts; so that a person let into possession of and holding lands under an agreement to purchase, is not a cestui que trust within this section (*e*). A cestui que trust may, in a certain sense, be tenant-at-will to his trustee, if he has been let into possession of the trust estate by the latter, although he is not a tenant-at-will capable of acquiring a title by reason of his possession, within the third section of the statute. The possession of the cestui que trust is, in fact, the possession of the trustee, and the time of limitation will not run against the latter, so long as the relationship of trustee and cestui que trust subsists (*f*). But this applies only to the case where the cestui que trust is the actual occupant. If he is merely allowed to receive the rents or otherwise deal with the estate in the hands of the occupying tenants, he stands in the relation only of an agent or bailiff of the trustees, who choose to allow him to act for them in the management of the estate; and if the actual occupier is, under such circumstances, permitted to occupy for

(*d*) *Doe v. Moore*, 9 Q. B. 561.

(*e*) *Doe v. Rock*, 4 M. & Gr. 31.

(*f*) *Garrard dem. Tuck*, 8 C. B. 252;
18 Law, J., C. P. 338.

more than the twenty years prescribed by the statute, without paying rent, the trustees lose their title, and the actual occupier gains the title exactly as in an ordinary case of landlord and tenant (*g*). But if the cestui que trust has been let into possession by the trustees, the tenancy between him and his trustees will not be determined by his underletting the premises, unless the trustees have notice of such underletting; for though the general rule is that a tenancy-at-will is not assignable, because the transfer determines the tenancy, yet the rule is subject to the qualification, that a tenant-at-will cannot at common law determine his tenancy by transferring his interest to a third party, without notice to his landlord (*h*).

Title of bond-fide purchasers of trust estates.—When any land is vested in a trustee upon any express trust, the right of the cestui que trust, or any person claiming through him, to bring a suit against the trustee, or any person claiming through him, to recover such land, is (s. 25) to be deemed to have first accrued at, and not before, the time at which such land shall have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser, and any person claiming through him.

Of the gaining of a title to the inheritance by parties who obtained possession originally as tenants from year to year.—It is further enacted (s. 8), that when any person shall be in possession or receipt of the profits of any land or rent, as tenant from year to year or other period, without any lease in writing, the right of the person entitled subject thereto, or of the person through whom he claims, shall be deemed to have first accrued at the determination of the first of such years or other periods, or at the last time when any rent, payable in respect of such tenancy, shall have been received (which shall last happen). A tenant holding a house of parish-officers upon the condition of sweeping the church, or ringing the church-bell, is a tenant from year to year, within this section of the statute (*i*). The words "lease in writing" are construed to mean not merely a demise in writing, but such an instrument as passes an interest (*k*). Verbal declarations and admissions made by a tenant in possession of his having paid rent, and of the party to whom it was paid, are admissible in evidence to establish the fact of the receipt of rent within this section (*l*).

Effect of continued wrongful receipt of rent.—It is also enacted (s. 9), that

(*g*) *Melling v. Leuk*, 10 C. B. 609; 24 Law, J., C. P. 187. *Doe v. Phillips*, 10 Q.-B. 134.

(*h*) *Carpenter v. Collins*, Yelv. 73. *Pinhorn v. Souster*, 8 Exch. 763. *Melling v. Leuk*, 10 C. B. 609.

(*i*) *Doe v. Benham*, 7 Q. B. 962. *Doe*

v. Billett, ib. 983. *Doe v. Hinde*, 2 M. & Rob. 441.

(*k*) *Doe v. Gower*, 17 Q. B. 589; 21 Law, J., Q. B. 57.

(*l*) *Doe v. Beckett*, 4 Q. B. 305; 12 Law, J., Q. B. 236.

when any person shall be in possession or receipt of the profits of any land, or in receipt of any rent, by virtue of a lease in writing, by which a rent of 20s. or upwards shall be reserved, and the rent shall have been received by some person wrongfully claiming to be entitled to such land or rent in reversion, immediately expectant on the determination of such lease, and no payment in respect of the rent reserved by such lease shall afterwards have been made to the person rightfully entitled thereto, the right of the person entitled to such land or rent, subject to such lease, or of the person through whom he claims, to make an entry or distress, or bring an action, after the determination of such lease, shall be deemed to have first accrued at the time at which the rent was first so received by the person wrongfully claiming; and no such right shall be deemed to have first accrued upon the determination of such lease to the person rightfully entitled.

Entry upon land, and continued claim.—It is further enacted (s. 10), that no person shall be deemed to have been in possession of any land within the meaning of the act, merely by reason of his having made an entry thereon; and (s. 11) that no continual or other claim upon or near any land shall preserve any right of making an entry, or distress, or of bringing an action.

Possession of coparceners, joint-tenants, and tenants-in-common.—When any one or more of several persons entitled to any land or rent as coparceners, joint-tenants, or tenants-in-common, shall have been in possession or receipt of the entirety, or more than his or their undivided share for his or their own benefit, or for the benefit of any person other than the persons entitled to the other shares of the land or rent, such possession or receipt is not to be deemed to have been the possession or receipt of, or by such last-mentioned persons, or any of them.

Possession of younger brothers or relations.—When a younger brother, or other relation of a person entitled as heir to the possession or receipt of the profits of land, or to the receipt of rent, enters into the possession or receipt thereof, such possession or receipt is not to be deemed to be the possession or receipt of the heir.

Acknowledgment in writing equivalent to possession.—By s. 14 it is further enacted, that when any acknowledgment of the title of the person entitled to any land or rent shall have been given to him or his agent in writing, signed by the person in possession or in receipt of the profits of such land, or in receipt of such rent, then such possession or receipt by the person by whom such acknowledgment shall have been given shall be deemed to be the possession or receipt of the person to whom or to whose agent such acknowledgment shall have been given at the time of giving the same; and the right of such last-mentioned person, or any

person claiming through him, shall be deemed to have first accrued at, and not before, the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given (*m*).

Ecclesiastical and eleemosynary corporations are allowed (s. 29) two incumbencies, and sixty years for the recovery of land.

Disabilities.—Ten years are allowed (s. 16) in all cases for persons under disability from the time the disability ceases, but no action is to be brought (s. 17) after forty years. The disabilities enumerated as having the effect of extending the period of limitation, are infancy, coverture, idiotcy, lunacy, unsoundness of mind, and absence beyond seas, at the time the right to make an entry or distress, or bring action to recover any land or rent, shall have first accrued. The extension of the period of limitation is granted also from the death of the person under disability.

Preservation of the rights of the landowner by re-entry and resumption of possession of lands before the expiration of the period of limitation.—We have seen, by s. 7 of the statute 3 & 4 Wm. 4, c. 27, that when any person is in possession of land as tenant-at-will, the right of the landowner to enter upon the land, or recover it by action, accrues either at the determination of such tenancy, or at the expiration of one year after the commencement thereof, at which time the tenancy, if not previously determined by the act of the landowner, shall be deemed to have determined. We have seen, also, that no person is to be deemed to have been in possession of land within the meaning of the act, merely by reason of his having made an entry thereon, and that no continual claim upon, or near to land, shall preserve any right of making an entry or bringing an action (*ante*, p. 147). “The making an entry,” observes Creswell, J., “amounts to nothing unless something is done to divest the possession out of the tenant and revest it in fact in the lord.” Where, therefore, the defendant had inclosed a piece of land from the waste and built a hut thereon, and the lord of the manor entered upon the premises, and said he took possession in his own right, and ordered a stone to be removed from the hut, and a portion of the fence to be thrown down, but did not turn the defendant and his family out of the cottage, it was held that this was no interruption of the possession of the defendant, and no vesting of the possession in himself, and that the lord had not done enough for the assertion of his rights, and for preventing the defendant from gaining a title under the statute (*n*). Where, on the other hand, the overseers of a parish put the plaintiff into possession of a parish cottage as a parish

(*m*) *Ley v. Peter*, 3 H. & N. 101; 27 Law, J., Exch. 239. *Goode v. Job*, 28 ib. Q. B. 1. *Fursdon v. Clogg*, 10 M. & W. 576.

(*n*) *Doe v. Coombes*, 9 C. B. 718; 19 Law, J., C. P. 906. *Brassington v. Llewellyn*, 27 Law, J., Exch. 297.

pauper, and he having continued in possession for a long time without paying any rent, the overseers in 1839 entered upon the cottage, to prevent him from gaining a title under the statute, and turned out both him and his family and removed his furniture; but, on the same day, the plaintiff resumed possession of the cottage, and continued in possession till July 1852, when the overseers again entered, and he refusing to deliver up the cottage, they destroyed it, and the plaintiff then brought an action of trespass, and the defendants pleaded that the cottage was not the property of the plaintiff; it was held that the right of the defendants was not barred, as they had in 1839 actually dispossessed the plaintiff, and resumed possession of the cottage, and clothed themselves with their original rights. "Whether the plaintiff," observes Lord Campbell, "during the interval between 1839 and 1852 was tenant-at-will or tenant-at-sufferance, or a mere trespasser, seems to be wholly immaterial, so that the overseers had not in the interval done anything to prejudice the right of entry which vested in them in 1839. It is admitted that the plaintiff would have had no title had the jury found that his subsequent occupation was under a new tenancy-at-will; but how would this at all have affected the new right of entry which had accrued in April 1839? An attempt was made to do away with the effect of what then happened, by resorting to section 10 of the statute, which enacts, 'that no person shall be deemed to have been in possession of any land within the meaning of this act, merely by reason of having made an entry thereon.' But this evidently applies to a mere entry, as for the purpose of avoiding a fine, which may be made by stopping on any corner of the land in the night-time and pronouncing a few words, without any attempt, or intention, or wish to take possession. In the present case possession was actually taken by the overseers *animo possidendi*; and whether possession was retained by them an hour or a week must, for this purpose, be immaterial. They were lawfully in possession of their fee-simple title, and by nothing that had previously happened could their right in respect of the Statute of Limitations be at all prejudiced. A number of cases were cited in the argument to show that if, after the determination of the tenancy-at-will, independently of the statute, the tenant continues in possession at sufferance till the expiration of twenty-one years from the commencement of the tenancy, the statute is a bar. We do not consider it necessary, on this occasion, to examine these cases; and it may be too late now to consider, except in a court of error, whether, where the tenant has remained in possession continuously for twenty-one years, the tenancy-at-will being determined during that time by an act of the landlord, without his actually having been in possession, there be any ground for the distinction as to the operation of the statute between a subsequent

tenancy-at-sufferance and a new tenancy-at-will, which is allowed to create no bar. But, without conflicting with any prior decision, we think that, in this case, by reason of the possession of the overseers in April 1839, we are bound to decide in their favour" (o).

A landowner who accommodates a servant or poor relation with a cottage and garden, does not necessarily part with the possession of the property occupied by such servant or poor relation. The latter may have the mere custody of the property; his possession, such as it is, may be the possession of the landowner (p); and the latter may retain and continue to exercise his proprietary and possessory rights so as to rebut the presumption that he has parted with the possession of the property, and prevent the operation of the Statute of Limitations. If a landowner allows his gardener, or servant, or workman employed upon his estate to live in a cottage thereon rent free, the possession of the servant is the possession of the master, and the servant has no greater interest in the land than a coachman who occupies part of his master's coach-house, or sleeps over his master's stable; and no title can be gained by such an occupation and enjoyment of the master's property, however long it may be continued. And if a landowner, from motives of kindness or charity, allows a dependent, relative, or friend to occupy a cottage and land upon his estate, and the landowner, during such occupation, continues to exercise acts of ownership over the land so occupied; if he repairs the buildings, cuts down or plants trees, or causes drains to be made through the land, or quarries and carries away stone, all these acts of dominion exercised by him over his own property show that he has never parted with the possession of it, although he has allowed another person to occupy it, and share with him in the use and enjoyment thereof (q).

Rights of mortgages.—The statute 7 Wm. 4, & 1 Vict. c. 28, provides that it shall be lawful for any person claiming under any mortgage of land to make an entry, or bring an action or suit to recover such land, at any time within twenty years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than twenty years may have elapsed since the time at which the right to make such entry, or bring such action or suit, shall have first accrued (r).

Title to the sea-shore.—The sea-shore between high-water and low-water mark is *prima facie* the property of the Crown (s), and is extra-parochial, unless it be shown by common reputation or otherwise to form

(o) *Randall v. Stevens*, 23 Law, J., Q. B. 71; 2 Ell. & Bl. 650.

(p) *Bertie v. Beaumont*, 16 East, 33.
Hunt v. Colson, 3 M. & Sc. 701. *Doe v. Stanton*, 2 B. & Ald. 371. *Mayhew v. Suttle*, 4 El. & Bl. 353.

(q) *Turner v. Doe*, 9 M. & W. 645.

(r) *Doe v. Massey*, 17 Q. B. 381; 20 Law, J., Q. B. 434.

(s) *Hale de Jure Maris*, Hargrave's Law Tracts, pp. 25-37.

part of an adjoining parish (*t*). The soil may, however, be vested in a private individual, or in the lord of the manor, by ancient grant from the Crown, and may form part of the adjoining manor; but proof that it does so ought to be strictly and rigidly required from all lords of manors who set up exclusive rights in the soil, in derogation of the free use and enjoyment of the sea-shore by the publick. Where proof was given by the lord of the manor or territory of Gower of an ancient grant of the terra de Gower in the time of King John, and the limits of the manor both on the land and the sea-side were uncertain, common reputation, modern usage, and the exercise by the lord of acts of dominion over the sea-shore, were admitted in evidence to show the boundary of the manor on the sea-side (*u*).

And where a manor was held under an ancient grant from the Crown, which professed to grant the manor with wreck of the sea, several fishery and other rights of an extensive description, but did not expressly purport to convey "*littus maris*," it was held that acts of dominion and ownership exclusively exercised by the lord upon the adjoining sea-shore, between high and low-water mark, and which acts would have been unlawful without a license or grant from the Crown, such as the constant and exclusive digging and taking away of sand, stones, gravel, and sea-weed, might be called in aid of the grant to show that the sea-shore was parcel of the manor (*x*). But mere occasional acts of taking sand or gravel, shells or sea-weed, from the sea-shore, ought not of themselves, without proof of adverse and exclusive enjoyment on the part of the lord, to raise any presumption of a grant of the soil from the Crown; nor would a jury from such evidence find a grant (*y*). By a grant of the sea-shore, the Crown conveys not that which at the time of the grant is between high and low-water marks, but that which from time to time shall be between these two termini, so that the freehold shifts as the sea recedes or encroaches. The ordinary limit of the sea-shore is the line of the medium high tide between the springs and the neaps (*z*).

Different rights in the sea-shore may be vested in a subject, according to the terms of the grant. The king may have granted to a subject the soil itself, or the general privilege of fishing, or of laying, keeping, and taking oysters on that spot (*a*). But the grantee of the Crown must take subject to such prescriptive rights as may have been acquired by subjects by immemorial usage and enjoyment (*b*).

(*t*) *Reg. v. Musson*, 6 Week Rep. Q. B. 246.

(*u*) *Duke of Beaufort v. Mayor, &c. of Swansea*, 3 Exch. 418.

(*x*) *Calmady v. Rowe*, 6 C. B. 861.

(*y*) *Livett v. Wilson*, 3 Bing. 115.

(*z*) *Att.-Gen. v. Chambers*, 4 De G. M. & G. 213.

(*a*) *Scrutton v. Brown*, 4 B. & C. 497.

(*b*) *Ld. Denman, C. J., Mayor of Colchester v. Brooke*, 7 Q. B. 374. Ante, ch. 2.

Of the title to waste uninclosed land adjoining the sea-shore.—All uninclosed waste land abutting on the sea-shore, and situate above the high-water mark of ordinary spring-tides, belongs *prima facie* to the owner of the adjoining property, although it is covered with beach and sea-weed, and overwhelmed with the waves at extraordinary spring-tides (c).

Of the right to the soil of turnpike-roads and highways.—The soil of a turnpike-road is not vested in the trustees of the road. The trustees have only the control of the highways, the ordinary rule being that the land-owners on either side of the road are entitled to the soil of the road, *usque ad medium filum viæ*; and, if a landowner owns the soil on both sides of the road, he is entitled to the soil of the whole road (d). This is a presumption of law founded on the assumption that in making a road for public convenience, the owners of the land on each side of the road have contributed a portion of their land towards the formation of the road. But the presumption may be rebutted by evidence that the road was made on soil belonging exclusively to the owner of the land on one side only of the road (e). Where the owner of two parcels of land on either side of a highway conveys them to a purchaser, the soil of the road passes by presumption of law, although the conveyance is silent as to the existence of the road, and although the particular measurement of each parcel of land is given, which would exclude the road; but this presumption may be rebutted by circumstances showing that the grantor did not intend to transfer to the grantee his right of ownership in the soil of the highway. Words in an instrument of grant, as elsewhere, are to be taken in the sense which the common usage of mankind has applied to them in reference to the subject-matter of the grant. And if lands abutting upon a highway are described in the grant as bounded by the highway, the right to the soil, *ad medium filum viæ*, will be impliedly included in the grant, unless the surrounding circumstances rebut the presumption (f).

No legal presumption arises as to the ownership of soil in a road, where the road is defined for the first time under a newly-created authority, such as a board of commissioners for inclosing lands, acting under the powers of an act of parliament (g).

Of the right to the soil of accommodation-ways and private roads.—If a landowner makes a road on his own soil for his own accommodation, and then conveys to a purchaser a plot of land abutting upon one side of the

(c) *Lowe v. Govett*, 3 B. & Ad. 869. Hale, *de jure maris*, c. 4, p. 12. Harg. Law Tracts.

(d) *Davison v. Gill*, 1 East, 69. *Marquis of Salisbury v. Gt. North. Rail. Co.*, 28 Law, J., C. P. 53; 5 C. B., N. S. 208.

(e) *Holmes v. Bellingham*, 33 Law, T. R. 239.

(f) *Lord v. Sidney City Com., &c.*, 33 Law, T. R., 1 (H. L.)

(g) *Rex v. Hatfield*, 4 Ad. & E. 156.

road, and grants to the purchaser a right of way along the road, no right to the soil of the road passes to the latter (ante, pp. 142).

Of the title to waste lands adjoining publick highways.—Waste land extending along a publick highway is presumed, in the first instance, to belong to the owner of the adjoining land, and not to the lord of the manor (*h*); but this presumption prevails only so long as proof to the contrary is wanting (*i*). In remote and ancient times, when roads were frequently made through uninclosed lands, and when the same labour and expense were not employed upon roads, and they were not formed with that exactness which the exigencies of society now require, it was part of the law that the publick, where the road was out of repair, might pass along the land by the side of the road. This right on the part of the publick was attended with this consequence—that although the parishioners were bound to the repair of the road, yet, if an owner excluded the publick from using the adjoining land, he cast upon himself the onus of repairing the road. If the same person was the owner of the land on both sides, and inclosed both sides, he was bound to repair the whole of the road; if he inclosed on one side only, the other being left open, he was bound to repair to the middle of the road; and where there was an ancient inclosure on one side, and the owner of lands inclosed on the other, he was bound to repair the whole. Hence it followed, as a natural consequence, that when a person inclosed his land from the road, he did not make his fence close to the road, but left an open space at the side of the road, to be used by the publick when occasion required. This appears to be the most natural and satisfactory mode of explaining the frequency of wastes left at the sides of roads: the object was to leave a sufficiency of land for passage by the side of the road when it was out of repair (*k*).

But the ordinary presumption, that a narrow strip of land lying between the highway and the adjoining close belongs to the owner of the close, is either done away with or considerably narrowed, if the narrow strip is contiguous to, or communicates with, open commons or larger portions of land; for the evidence of ownership which applies to the larger portions, applies also to the narrow strip which communicates with them (*l*).

Of the right to the soil of towing-paths.—Navigation companies authorized by statute to set out towing-paths, first giving satisfaction to the owners and proprietors of lands made use of for the purpose, do not, by forming a towing-path and giving satisfaction to the owner of the land

(*h*) *Doe v. Pearsey*, 7 B. & C. 307.

(*i*) *Doe v. Hampson*, 4 C. B. 273.

Dendy v. Simpson, 18 C. B. 881.

(*k*) *Steel v. Prickett*, 2 Stark. 469.

Headlam v. Hedley, Holt, N. P. C. 462.

Doe v. Kemp, 2 Bing. N. C. 102.

(*l*) *Grose v. West*, 7 Taunt. 42.

over which the path is formed, acquire more than a right of way for towing, in the nature of a servitude or easement. Statutory powers of this sort do not enable them to acquire the soil itself (*m*). Landowners whose lands abut upon a navigable river or canal, along which a towing-path extends, have in general a right to form wharfs and to cross the towing-path wherever they please, for the purpose of loading and unloading vessels, provided they do not interfere with the use of the towing² path (*n*).

Of the right of property in trees and bushes.—According to the old authorities, the general property in trees is in the landlord, and the general property in bushes is in the tenant, although, if he exceeds his right—as by grubbing up or destroying fences—he may be liable to an action of waste. The tenant has the general property in the cuttings of a hedge, whoever cuts it (*o*).

Of the ownership of trees standing in boundary-hedges.—In an old case, it is said “that if a tree grows in a hedge which divides the land of A and B, and by the roots takes nourishment in the land of A and also of B, they are tenants-in-common of the tree, and so it was adjudged” (*p*). But this must be understood of fences of which the adjoining owners are also tenants-in-common; for the general rule is, that the ownership of the tree follows the ownership of the hedge, and the tree will be held to belong to the party on whose land the trunk stands, without reference to the direction of the roots. By the French law, “Trees which are found in a common hedge are common like the hedge; each of the two proprietors has the right to require that they should be felled.”

“He whose property is overshadowed by the branches of his neighbour’s trees may compel the latter to cut off such branches. If it be the roots which encroach on his estate, he has a right to cut them therein himself” (*q*).

Of the right of property in boundary-walls and fences.—Evidence of a common user by two adjoining proprietors of a boundary-wall separating their two estates justifies the presumption, either that the wall was originally built on land belonging in undivided moieties to the owners of the respective premises, and at their joint expense, or that it had been agreed between them that the wall, and the land on which it stood, should be considered the property of both as tenants-in-common, so as to insure to each a continuance of the use of the wall (*r*). “When a wall is common property, it may happen, either that a moiety of the land on

(*m*) *Badger v. South York. Rail. Co.*, 28 Law, J., Q. B. 120; 7 Week Rep. 130.

(*n*) *Monm. Canal & Rail. Co. v. Hill*, 4 H. & N. 427.

(*o*) *Berriman v. Peacock*, 9 Bing. 384.

(*p*) Anon. 2 Rolle Rep. 255. *Waterman v. Soper*, 1 Ld. Raym. 737. *Holder v. Coates*, M. & M. 112.

(*q*) Cod. Civ. art. 673, 672.

(*r*) *Wiltshire v. Sidford*, 8 B. & C. 259 n.

which it is built may be one man's, and the other moiety another's, or the land may belong to the two persons in undivided moieties." But "whenever the land on which a boundary-wall is intended to be built belongs on one side to one party, and on the other to the other party, and they between them agree to build the wall, it would be prudent," observes Bayley, J., "to make this bargain, that so long as there was to be a wall continuing on the property, the land on which it was built, and the wall which stood upon that land, should be taken and considered to be the common property of the two, and that the owners of the estates on each side should be tenants-in-common of the undivided moiety of that land and of the wall, with the power of adopting such remedies for partition as tenants-in-common may adopt; for if the wall stood partly on one man's land, and partly on another's, either party would have a right to pare away the wall on his side, so as to weaken the wall on the other, and to produce a destruction of that which ought to be the common property of the two."

If one tenant-in-common of a wall destroys the wall which is the subject of the tenancy-in-common, that is an actual ouster and expulsion of the one by the other, so that the party expelled and injured may maintain an action against the wrong-doer for the recovery of damages; but if the wall is pulled down for the mere purpose of rebuilding it, and providing a better and stronger wall, no action is, it seems, maintainable. If an improper addition is made to the height of the wall by one tenant-in-common to the injury of the other, the latter may remove the heightened portion of the wall (*s*). Where a building is placed against the wall by one of two tenants-in-common of the wall, and the wall is heightened and carried up into a chimney, this is evidence of an ouster of the other tenant-in-common, as the altered wall and the old wall are not identical things, and the nature of the property is substantially changed (*t*).

In general, where a boundary-wall is built at the joint expense of adjoining proprietors under the provisions of a building act, so that half the thickness of the wall stands on the ground of each proprietor, the two proprietors are not tenants-in-common of the wall, but each is entitled to the ordinary remedy for any injury done to the part of the wall which stands on his own land (*u*).

Of the ownership of ditches and hedges.—"The rule," observes Lawrence, J., "about ditching is this. No man making a ditch can cut into his neighbour's soil, but usually he cuts it to the very extremity of his own land; he is, of course, bound to throw the soil which he digs out upon

(*s*) *Cubitt v. Porter*, 8 B. & C. 257.
Murray v. Hall, 7 C. B. 441. *Murly*
v. M'Dermott, 8 Ad. & E. 138.

(*t*) *Stedman v. Smith*, 8 Ell. & Bl. 1;
 20 Law, J., Q. B. 315.

(*u*) *Matts v. Hawkins*, 5 Taunt. 22.

his own land, and often, if he likes it, he plants a hedge on the top of it ; therefore, if he afterwards cuts beyond the edge of the ditch, which is the extremity of his land, he cuts into his neighbour's land, and is a trespasser ; no rule about four feet and eight feet has anything to do with it. He may cut the ditch as much wider as he will, if he enlarges it into his own land" (x). A boundary-hedge, separating one estate from another, belongs in general to the occupier, who has been in the habit of cutting and repairing the hedge. Proof of the exercise of acts of ownership over the hedge is *prima* evidence of the property in the hedge being in the party who has exercised such acts. In some instances, the adjoining owners are tenants-in-common of the hedge separating their respective properties, so that each has a right to clip the hedge, but not to grub it up (y).

By the French law, all ditches between two estates are presumed common, if there be no title or proof to the contrary. But it is proof that a ditch is not common when the bank or earth thrown up is found only on one side of the ditch. The ditch, in such a case, is deemed to belong exclusively to him on whose side the earth is found to be thrown up. Every hedge which separates two estates is reputed common to both, unless there be only one of the estates in an inclosed condition, or unless there be vouchers or sufficient possession to prove the contrary (z).

SECTION III.

OF ACTIONS FOR TRESPASSES UPON LANDS AND TENEMENTS.

Of actions against the hundred for damage done to tenements by rioters.—By 7 & 8 Geo. 4, c. 31, s. 2, it is enacted, that if any church or chapel, house, stable, &c., or any building or erection used in any trade or manufacture, or in conducting the business of any mine, or any engine or machinery employed in any manufacture, or in working any mine or any bridge, waggon-way, &c., or trunk for conveying minerals, shall be feloniously demolished, pulled down, or destroyed, wholly or in part, by any persons riotously assembled together, the inhabitants of the hundred shall, if the damage done exceeds 30*l.*, be liable (s. 8) to yield full compensation to the persons damnified by the offence, and also for any damage which may at the same time be done to any fixture, furniture, or goods,

(x) *Vowles v. Miller*, 3 Taunt. 137.

(y) *Voyce v. Voyce*, Gow. 201.

(z) Cod. Nap. Liv. 2, No. 666-672.

in any such church, chapel, house, or buildings. Under this statute a borough is liable to contribute, as part of the hundred, to the damage done, notwithstanding the provisions of the Municipal Corporation Act (a). But before an action can be maintained, the persons damnified, or such of them as have knowledge of the circumstance of the offence, or the servant or servants who had the care of the property damaged, must, within seven days after the offence, go before some neighbouring justice of the peace, having jurisdiction over the locality of the offence, and state upon oath the names of the offenders, if known, and submit to the examination of such justice touching the circumstances of the offence, and become bound by recognizance to prosecute, &c.; but every such action must be commenced within three calendar months after the commission of the offence.

No action can (s. 8) be maintained against the hundred in cases where the damage done does not exceed 30*l.*, but the party damnified must hand in a notice of claim to the high constable of the hundred, who is to exhibit such claim to two justices of the peace, who are to appoint a petty session for the purpose of hearing and determining such claim.

Parties to actions for trespasses—Heirs-at-law.—The heir-at-law cannot maintain trespass for an injury to lands descended to him without entry; but, after entry, his right of possession relates back so as to support an action against a wrong-doer for a trespass committed at an antecedent period (b).

Tenants-in-common.—An action is maintainable by one tenant-in-common against his co-tenant, or the licensee of the latter for digging up and carrying away the soil of the close of which they are tenants-in-common. In such an action, a plea that the close is not the close of the plaintiff is not supported by proof that the plaintiff is tenant-in-common of it, with others who authorized the trespasses (c). One tenant-in-common also may sue his co-tenant-in-common in trespass for turning him or his servants off the land, or out of the house holden in common (d).

Tenant and reversioner.—The actual occupier of real property is always entitled to maintain an action for unjustifiable trespasses thereon; but the owner, who has parted with the possession in favour of a tenant or lessee, cannot maintain an action for temporary trespasses, unless an injury has been thereby occasioned to his reversionary estate. If a house or land is occupied merely by the servant of the owner, the occupation of the

(a) *Birley v. Salford*, 11 M. & W. 399.

(b) *Barnett v. Earl Guildford*, 11 Exch. 19; 24 Law J., Exch. 281.

(c) *Wilkinson v. Haygarth*, 12 Q. B.

837; 16 Law J., Q. B. 103.

(d) *Murray v. Hall*, 7 C. B. 454; 18 Law J., C.P. 161.

servant is the occupation of the owner, and the latter, being then the occupier as well as the owner, may sue for any temporary trespass or injury, rendering his occupation less profitable or commodious; but where the land has been demised to a lessee, who has entered thereon, and is clothed with the possessory interest, the lessee, and not the landlord, is the proper party to sue for a trespass upon the property, unless the wrongful act complained of imports a damage to the reversionary estate (e). Where the injury is of a permanent nature, and deteriorates the marketable value of the property, so that if the landlord or reversioner was to sell it, it would fetch less money in the market, there is, as we have seen, a damage to the reversionary estate, in respect of which the reversioner may maintain an action (f). "The removal of the smallest portion of soil must, in general, be esteemed an injury to the reversion, because it tends to alter the evidence of title" (g).

In the case of permanent injuries to buildings, from trespasses or acts of negligence by strangers, the tenant is entitled to sue in respect of the immediate residential injury, and the reversioner in respect of the diminished saleable value of the property (h). Where trees have been injured by a stranger, the lessor and the lessee may both sue in respect thereof; the lessor for the damage done to the body of the tree, the lessee for the loss of the shade and fruit (i). So may the copyholder and the lord (k). But the reversioner cannot, as we have seen, maintain an action against a stranger for entering upon his land in the occupation of his lessee, and with carts and horses trampling down the soil and grass though the entry be made in the exercise of an alleged right of way, as the act is not attended with any permanent injury to the reversion. "Such an act," observes Parke, J., "done while the premises were out on lease, would not be evidence of any right as against the reversioner" (l).

If several parties are entitled to the reversion as joint-tenants, parceners, co-heirs in gavelkind, all of them should be joined, as we have seen (ante, p. 10), as plaintiffs in an action for an injury to the reversion (m). So, if there are several occupiers or tenants of the injured property, all should be made plaintiffs in an action for damage done to the possessory interest in the premises. Tenants-in-common also "should join in actions personal, as trespass in breaking into their house, breaking their inclosure or fences, feeding, wasting, or defouling their grass,

(e) *Dobson v. Blackman*, 9 Q. B. 991.

(f) Ante, pp. 10, 64.

(g) Per Cur. *Alston v. Scales*, 9 Bing. 41.

(h) *Hosking v. Phillips*, 3 Exch. 168; post, s. 2, *Damages*.

(i) *Bedingfield v. Onslow*, 3 Lev. 200.

(k) *Jefferson v. Jefferson*, ib. 131.

(l) *Baxter v. Taylor*, 4 B. & Ad. 75; ante, p. 42.

(m) Bac. Abr. JOINT-TENANTS, K. *Deering v. Moor*, Cro. Eliz. 554. Ante, pp. 10, 106

cutting down their timber, fishing in their piscary, &c., and shall recover jointly their damages, because in those actions, though their estates are several, yet the damage survives to all, and it would be unreasonable to bring several actions for one single trespass" (n).

Parties to be made defendants.—Actions for trespasses, and injuries to real property, may be brought either against the hand actually committing the injury, or against the party by whose order or authority the act was done. A master is liable for any act done by his servant in the course of executing his orders; and therefore, where a master ordered his servant to lay some rubbish near his neighbour's wall, but so that it might not touch the wall, and the servant used ordinary care in executing the orders of his master, but some of the rubbish naturally ran against the wall, it was held that the master was liable in trespass (o). But to render the master liable for the wrongful acts of the servant, the servant must, at the time he does the wrong, be acting in the execution of the master's orders, and within the scope of his employment as a servant, and must be honestly endeavouring to accomplish something ordered to be done by his master; for if he wilfully quits sight of the object for which he is employed, and without having in view his master's orders, pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him, and the master will not be answerable for his act. Thus it is said that, "If my servant, contrary to my will, chase my beasts into the soil of another, I shall not be punished (p); and if my servant, without my knowledge, put my beasts in another's land, my servant is the trespasser, and not I, because, by the voluntary putting of the beasts there without my assent, he gains a special property for the time, and so to this purpose they are his beasts" (q).

If fences are allowed to go to ruin, and cattle escape and trespass upon the adjoining land, the action for the injury must be brought against the party who is by law bound to uphold the fence (ante, p. 65). The action cannot be supported against the landlord when the land is in the possession of a tenant; for it is, as we have seen, the duty of the actual occupier to repair and maintain fences, and not the duty of the landlord (r).

Where several persons have been jointly concerned in the commission of a trespass, they may, in general, be sued jointly as principals, or the plaintiff may sue any of them separately at his election (s).

Declaration for trespasses upon land.—*Venue.*—The rule that the name

(n) Bac. Abr. JOINT-TENANTS, K; post, ch. 19.

(o) *Gregory v. Piper*, 9 B. & C. 591; 4 M. & R. 500.

(p) Bro. Abr. TRESPASS, pl. 435.

(q) 2 Roll. Abr. 553.

(r) *Cheetham v. Hampson*, 4 T. R. 318.

(s) *Ld. Kenyon, C. J., Mitchell v. Turnbull*, 5 T. R. 651; post, ch. 19.

of the county from which the jury are to come to try the action is to be stated in the margin of the declaration (post, ch. 20), does not apply to actions for trespass to land, where the place in which the trespass was committed is described in the body of the declaration. The cause of action for an injury to realty is local, and must, unless the venue is changed by judge's order, be tried in the county where it arises, and where the property is situate; but any defect in naming the place of trial, or laying the venue, is cured by the statute 16 & 17 Car. 2, c. 8 (t). The close or place in which the trespass was committed must be designated in the declaration by name, or abutments, or other description, or the plaintiff may be ordered to amend with costs, or give such particulars as the court or judge may think reasonable (u). The description should correspond with the state of the premises at the time of the commission of the trespass, and not at the time of the making the declaration (x). It should be reasonably accurate, and the name and situation of the close should be specified (y), and the trespass must be proved to have been committed at the place named (z). When there is a general district of land known by one general name, and there are several occupiers in the same district, each person may call his own part of the district by the general name (a).

The plaintiff may allege generally, "that the defendant broke and entered certain land of the plaintiff, called, &c. and depastured the same with certain cattle" (b). If special damage has resulted to the plaintiff from excavations made by the defendant in the soil of the plaintiff, the nature of the damage should be stated (c).

In an action against the hundred to recover compensation for the felonious demolition of a house, building, or erection, the same strictness of averment and proof is required as on the trial of an indictment for felony (d).

If the plaintiff declares as reversioner for an injury done to his reversion, the declaration must allege it to have been done to the damage of the reversion, or must state an injury of such a permanent nature as to be necessarily prejudicial thereto, and the want of such an allegation is cause for arresting the judgment (e).

(t) *Simmons v. Lillystone*, 8 Exch. 441; 22 Law, J., Exch. 218. *Warren v. Webb*, 1 Taunt. 379.

(u) Reg. Gen. 16 Vict. 18; 1 Ell. & Bl. App. lxxxii.

(x) *Humfrey v. Lond. & North-Western Rail. Co.*, 7 Exch. 325; 22 Law, J., Exch. 149.

(y) *Cocker v. Crompton*, 1 B. & C. 489.

(z) *Simmons v. Lillystone*, 8 Exch. 441; 22 Law, J., Exch. 218.

(a) *Cooke v. Jackson*, 9 D. & R. 490.

(b) 15 & 16 Vict. c. 76, sched.

(c) Ante, pp. 11, 12, 67, 68.

(d) *Barwell v. Winterstoke*, 14 Q. B. 708.

(e) *Baxter v. Taylor*, 4 B. & Ad. 74. *Jackson v. Pesked*, 1 M. & S. 234.

What may be given in evidence under the plea of not guilty in actions for trespasses upon realty.—In actions for trespasses upon land, the plea of not guilty operates as a denial of the defendant's having committed the trespass alleged in the place mentioned, but not as a denial of the plaintiff's possession, or right of possession, of that place which, if intended to be denied, must be traversed specially. All other pleas in denial must take issue on some particular matter of fact alleged in the declaration; and all matters in justification, and in confession, and avoidance of the cause of action, must be pleaded specially (*f*).

Of pleas denying the plaintiff's title or right of possession.—If the defendant intends to dispute the plaintiff's right of possession of, or title to, the land or messuage on which the trespass is alleged to have been committed, he must plead a plea, alleging that such land or messuage was not the land or messuage of the plaintiff, or a plea of *liberum tenementum*, which is a plea alleging that such close or land was the soil and freehold of the defendant. Under the plea that the land or messuage is not the plaintiff's, both the possession and title are in issue (*g*); but this is not the case with the plea of *liberum tenementum*, which admits the plaintiff's possession, but denies his title (*h*). Under these pleas, the defendant may show that the plaintiff is the trespasser, and not the defendant (*i*).

Of the plea of liberum tenementum, or plea of freehold.—The plea of *liberum tenementum* is a plea alleging that the close or land in which the trespass was committed was the soil and freehold of the defendant. This plea, as it has justly been observed, though held valid on account of long usage, is bad in reasoning, because the defendant may be a trespasser, though he is himself the freeholder; and to make the plea a consistent defence, it has been held that it admits such a possession in the plaintiff as would enable him to maintain the action against a wrong-doer, and to assert a freehold in the defendant, with a right to the immediate possession, as against the plaintiff (*k*). The plea was originally invented for the purpose of driving the plaintiff to prove his title to the land in dispute. It is a good plea to a declaration, which states only in general terms that the defendant, with a strong hand and against the form of the statute, broke and entered the plaintiff's dwelling-house, as the expressions, "with a strong hand and against the form of the statute," are mere matters of aggravation, and not of substantive charge (*l*). And if the declaration

(*f*) Reg. Gen. Hil. Term, 16 Vict., 1 Ell. & Bl. App. lxxi. lxxii.; post, ch. 20.

(*g*) *Jones v. Chapman*, 2 Exch. 803; 18 Law, J., Exch. 456; overruling *Whitington v. Bozall*, 5 Q. B. 143.

(*h*) *Slocumbe v. Lyall*, 6 Exch. 119.

(*i*) *Burling v. Read*, 11 Q. B. 908; 10 Law, J., Q. B. 291.

(*k*) *Ryan v. Clark*, 14 Q. B. 71; 18 Law, J., Q. B. 289.

(*l*) *Davison v. Wilson*, 11 Q. B. 902; 17 Law, J., Q. B. 196.

goes on to charge the defendant with having expelled the plaintiff from the dwelling-house, and seized and removed his goods, the plea covers and justifies the expulsion and removal of the goods, as well as the breaking and entering the house (*m*); but such a plea is no answer to an assault upon the person (*n*).

Replication—Estoppel.—To a plea of liberum tenementum the plaintiff may reply, that the defendant ought not to be admitted to plead the plea, because, &c. (showing some ground of estoppel); and the defendant must answer the replication by a rejoinder: but if a party means to insist on an estoppel, he must take the first opportunity of doing so which the pleadings afford him; if he fails to do this, he leaves the matter at large, so that the jury may decide upon the evidence before them, without regard to an estoppel (*o*).

Of the plea of leave and license.—The form of the plea of leave and license is, that the defendant did what is complained of by the plaintiff's leave (*p*). Under this plea it may be shown that the plaintiff granted to the defendant a right to enter upon his land, or granted him a lease thereof, or a license to occupy, or leave to enter upon and take possession of the *locus in quo*, and expel the plaintiff therefrom (*q*). Proof may be given under this plea of an exception of timber-trees in a lease made by the defendant to the plaintiff, or a reservation in a parol demise of hedges, trees, and thorn-bushes, with the lop and top, giving the defendant a right to enter upon the land, for the purpose of cutting and carrying away the trees or the loppings of the hedges and bushes (*r*); or it may be shown that the plaintiff took the defendant's goods, and carried them into his own land; whereupon the defendant entered upon the plaintiff's land, with his (implied) leave, and carried them back to the place from whence the plaintiff took them (*s*). If the plea does not extend to and cover the whole of the trespasses to which it is pleaded, the plaintiff will be entitled to judgment (*t*).

Special pleas of matters in confession and avoidance—Matters of excuse.—All matters in confession and avoidance are required to be specially pleaded (*u*), such as the defence that the defendant's cattle escaped from the defendant's land, and trespassed on the land of the plaintiff, through the neglect of the plaintiff to repair fences which he was bound by contract

(*m*) *Meriton v. Coombes*, 19 Law, J., C. P. 336. *Taylor v. Cole*, 1 Smith's Lead. Cas. 95–110.

(*n*) *Roberts v. Tayler*, 1 C. B. 117.

(*o*) *Feversham v. Emerson*, 11 Exch. 385; 24 Law, J., Exch. 254.

(*p*) 15 & 16 Vict. c. 76; Sched. B. No. 44.

(*q*) *Kavanagh v. Gudge*, 7 M. & Gr.

316; 7 Sc. N. R. 1025.

(*r*) *Hewitt v. Isham*, 7 Exch. 77; 21 Law, J., Exch. 35.

(*s*) Vin. Abr. TRESPASS, 1a. *Patrick v. Colerick*, 3 M. & W. 485.

(*t*) *Barnes v. Hunt*, 11 East, 451.

(*u*) Reg. Gen. Hil. Term, 16 Vict. 1 Ell. & Bl. App. lxxxi. lxxxii.

or by prescription to repair and maintain. Pleas of this sort must show how the obligation to repair arises (*x*).

Of pleas of justification of trespass.—Every defendant who justifies his entering or remaining upon the land of the plaintiff against his will, and, therefore, *prima facie*, against right, is bound to show, on the face of his plea, such circumstances as establish his right in abridgement of the general rights of property (*y*). If he justifies his entry in the exercise and enjoyment of a profit à prendre (*ante*, p. 17), or an easement (*ante*, p. 16), he must set forth in his plea the foundation of his right, showing whether he claims by grant or by prescription, or under a mere personal license of pleasure, which extends only to the individual licensee, and cannot be exercised with or by his servants; or a license of profit, enabling his servants to justify under it (*z*).

If the party claims under a particular estate, he must in his plea aver the continuance of that estate. Thus, if he derives his title from a tenant-for-life, he must aver and prove the continuance of the life-interest (*a*). Every plea of justification of trespass must, of course, extend to and cover the whole of the trespasses intended to be justified (*b*); but it need not be pleaded to acts which are not relied upon as trespasses, but are mere matters of aggravation, and not of substantive charge (*c*). Where the declaration charges the defendant with breaking and entering the plaintiff's house, and expelling him therefrom, a plea of justification, showing a good cause for the breaking and entering, is a full answer to the declaration, for the breaking and entering are the gist of the action, and the expulsion is only matter of aggravation. If the plaintiff means to insist on the expulsion as making the defendant a trespasser *ab initio*, he must new assign it (*d*).

Justification of trespass under the powers and provisions of an act of parliament.—Where the plaintiff complained that the defendant had built a bridge which encroached upon and projected over the land of the plaintiff, it was held that the defendant might plead generally that the several acts, matters, and things of which the plaintiff complained were lawfully done by the defendant, in exercise and by virtue of the powers given to the defendant by an act of parliament, made, &c., and intituled, &c. (*e*).

Pleas justifying the breaking and entering a dwelling-house without

(*x*) *Faldo v. Ridge*, Yelv. 74, 75.

(*y*) *Hayling v. Okey*, 8 Exch. 545.

(*z*) *Ante*, pp. 23, 24. *Wickham v. Hawker*, 7 M. & W. 78. *Moore v. Earl Plymouth*, 1 Moore, 346; 3 B. & Ald. 66.

(*a*) *Dayrell v. Hoare*, 12 Ad. & E. 368.

(*b*) *Curlewis v. Laurie*, 12 Q. B. 640.

(*c*) *Pratt v. Pratt*, 3 Exch. 413. *Davi-*

son v. Wilson, 11 Q. B. 903.

(*d*) *Taylor v. Cole*, 3 T. R. 297; 1 Smith's L. C. 95-110.

(*e*) *Beaver v. Mayor, &c. of Manchester*, 26 Law, J., Q. B. 311. *Watkins v. Gl. Northern Rail. Co.*, 16 Q. B. 961; and see post, ch. 15.

warrant (*f*) to make an arrest for felony, or to prevent the commission of murder, must show, in the first case, that a felony had been committed, and that there was reasonable ground for believing that the felon was in the house (*g*); and, in the second case, that the life of some person inside the house was really in danger; that there were calls for assistance; that the door was fastened; and that it was necessary to break it open and enter the house, and render assistance for the preservation of life (*h*).

Of pleas of justification under a prescriptive title.—When the defendant justifies, under a prescriptive right, to enter and take a profit of the soil (ante, pp. 41–53), he must set forth in his plea an enjoyment as of right, and without interruption for the full period of thirty years before the commencement of the action (*i*). And when he claims only an easement (ante, p. 16), he must set forth a similar enjoyment for the period of twenty years. The Prescription Act, 2 & 3 Wm. 4, c. 71 (ante, p. 39), enacts (s. 5) that in all pleadings where, before the passing of the act, the party claiming might by law have alleged his right generally, without averring the existence of the right from time immemorial, such general allegation shall be deemed sufficient; and if the same shall be denied, all the matters mentioned and provided in the act, which are applicable to the case, shall be admissible in evidence to sustain or rebut such allegation; and that in all actions and pleadings wherein it would have been necessary, before the passing of the act, to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof *as of right* by the occupiers of the tenement, in respect whereof the same is claimed, for such of the periods named in the act as may be applicable to the case; and if the other party intends to rely on any proviso, exception, incapacity, disability, contract, agreement, or any matter of fact or of law not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth in answer to the allegation of the claimant (ante, p. 40).

The nature of the right should be correctly set forth on the face of the plea; and if the exercise of it is limited to a particular purpose, if it is a right, for example, to enter upon land for the purpose of digging stones and sand for the necessary repair of a dwelling-house, it should be so stated, and that the dwelling-house was out of repair (*k*). When the defendant justifies under a plea of a right of common, he must by his

(*f*) As to justification under warrant, and in execution of legal process, see post, ch. 17.

(*g*) *Smith v. Shirley*, 3 C. B. 142.

(*h*) *Handcock v. Baker*, 2 B. & P. 260.

(*i*) *Jones v. Price*, 3 Sc. 376; 2 Bing.

N. C. 52. *Clayton v. Corby*, 2 Q. B. 813. *Holford v. Hankinson*, 5 Q. B. 584.

(*k*) *Peppin v. Shakespeare*, 6 T. R. 748.

plea set forth the nature of the right, and show whether he claims by grant or prescription. If the right be subject to restriction or qualification as to the number of the cattle, or the time of enjoyment, it must be so stated (*l*). If the right claimed be a right of common by prescription for all commonable cattle, levant and couchant, upon a particular farm (ante, p. 21), the defendant should set forth by his plea that, at the time of the alleged trespass, he was possessed of a messuage, farm, or land, the occupiers whereof, for thirty years before the commencement of the action, enjoyed, as of right and without interruption, common of pasture over the land of the plaintiff for all their commonable cattle, levant and couchant, upon the messuage, farm, or land of the defendant at all times, or at all usual or customary times, of the year, as the case may be, and that the alleged trespass was a user by the defendant of the said right of common (*m*).

Pleas of justification in the exercise of a right of way.—When the defendant justifies under a plea of a right of way, he should show the nature of the right, and whether it is claimed by grant or by prescription (ante, p. 66), or as a way by necessity (ante, p. 31) (*n*), setting forth in the last case the circumstance whereby the land over which the way is claimed became chargeable with the servitude (*o*). When the plea sets forth a title by prescription, it usually states that the defendant, at the time of the alleged trespass, was possessed of a messuage or land, the occupiers whereof, for twenty years before the suit, enjoyed, as of right and without interruption, a way on foot, and with horses, and carriages, and cattle, as the case may be, backwards and forwards from a certain publick highway over the land of the plaintiff to the land of the defendant, at all times of the year, for the more convenient occupation of the messuage and land of the defendant, and that the alleged trespass was a user by the defendant of the said way (*p*). The plea need not name or describe by metes and bounds the lands and closes in respect of which the right is claimed. A general description is sufficient; and if the plaintiff wants detailed information, he must call for particulars (*q*). The nature of the right should be correctly stated; and if the enjoyment of it is limited to particular times or periods, or to particular purposes, it should be so stated in the plea (*r*). There is one difference between pleading a publick and a private way. In the former case, it is not necessary to set out the termini; in the latter, both must be set out with certainty. It is not

(*l*) 1 Wm. Saund. 28, n. 4, 346b.

(*m*) 15 & 16 Vict. c. 76, Sched. pl. 47.

(*n*) *Houlton v. Frearson*, 8 T. R. 50.
Buckby v. Coles, 5 Taunt. 311.

(*o*) *Bullard v. Harrison*, 4 M. & S. 392.
Proctor v. Hodgson, 10 Exch. 824.

(*p*) 15 & 16 Vict. c. 76, Sched. 46.
Jones v. Price, 3 Bing. N. C. 52, 3 Sc. 376.

(*q*) *Holt v. Daw*, 16 Q. B. 995.

(*r*) *Higham v. Rabett*, 5 Bing. N. C. 624.

necessary, however, to set out the intervening closes over which the way passes (s).

Replications traversing the prescriptive right set up by the defendant's pleas.—The fact of the defendant's having the right claimed by his plea may be put in issue by a replication traversing the allegation of the right as set forth in the plea. If the right is claimed by grant, and the answer is that the grant has ceased to operate, the replication must show in what way the grant has ceased to operate (t). Though a prescription pleaded be larger than is necessary for the defendant's justification, the plaintiff must nevertheless traverse the whole of it. Since the Prescription Act, a plea setting up a right to a flow of water through a watercourse, and a right to enter upon the adjoining land for the purpose of cleansing and scouring the watercourse, is held to be a plea of the enjoyment of one entire prescriptive right, and is to be treated as one entire thing, and not as setting up two separate prescriptions. If a man pleads a prescriptive right to turn on cows, also a right to turn on horses, and for a right to turn on sheep, the plea sets up one entire right, and the plaintiff should traverse the whole (u).

Traverse of the enjoyment as of right and without interruption.—When the enjoyment as of right and without interruption is traversed by the plaintiff's replication, the defendant must show an uninterrupted rightful enjoyment, and his claim may be answered by proof of a license, written or parol, for a limited period, falling short of the period relied upon. Any evidence negating the continued enjoyment as of right is admissible under this issue; and every time that leave is asked for and obtained there is a break in the continuance of the enjoyment (x), because each asking of leave is an admission that, at that time, the asker had no right. Hence it follows that, not only an asking leave, but an agreement commencing within the period, may be given in evidence under the general traverse, notwithstanding the words of the fifth section of the Prescription Act; for the party cannot and does not rely on it as an answer to an enjoyment as of right, which he confesses, nor as avoiding any such enjoyment during the time covered by the agreement, but as showing that there was not, at the time when the agreement was made, an enjoyment as of right, and so the continuity is broken, which is inconsistent with the simple fact of enjoyment during the forty or twenty years (y).

If the plaintiff chooses to reply, and set up a tenancy-for-life, he

(s) *Simpson v. Lethwaite*, 3 B. & Ad. 238.

(t) *Parry v. Thomas*, 5 Exch. 41.

(u) *Peter v. Daniel*, 5 C. B. 568.

(v) *Monmouth Canal Co. v. Harford*, 1

C. M. & R. 631.

(y) *Tickle v. Brown*, 4 Ad. & E. 383.
Bright v. Walker, 1 C. M. & R. 219;
ante, pp. 49-51.

excludes the time of that tenancy, and drives the defendant to show thirty years' enjoyment, either wholly before the tenancy-for-life, if it be still subsisting, or partly before and partly after, if it be ended. But it has been said, "What if there had been an interruption for two years during the tenancy-for-life, and within thirty years before the action, is the plaintiff to be deprived of the benefit of such interruption?" The answer is, "No: although the tenant-for-life cannot, by acquiescence, burthen the estate, he may, by resistance, free it; and if the plaintiff chooses to avail himself of that resistance, he may traverse the enjoyment as of right for thirty years, and show the interruption." The defendant will not then be allowed to give the tenancy-for-life in evidence, in order to avoid the effect of the interruption (z).

Replications traversing the enjoyment of a right of way.—Under a replication denying that the defendant had used a way for forty years as of right and without interruption, the plaintiff is at liberty to show the character and description of the user and enjoyment during any part of the time, as that it was used by stealth, or in the absence of the occupier of the close, and without his knowledge, or that the land was let on lease, and that the user and enjoyment were without the privity of the landlord, and that the latter had no means of knowing what was done upon the land to the prejudice of the inheritance, and could not therefore have prevented it (ante, p. 41), or that the enjoyment was a precarious enjoyment, by leave and license, or any other circumstances which negative the fact that it was a user and enjoyment as of right (a).

All acts showing that the defendant's user, although as of right and without interruption for the period specified, was not such a user as would, before the Prescription Act, have been sufficient to establish a claim by prescription or grant, must be replied specially, and cannot be given in evidence under a traverse of the right of way alleged in the plea (b).

Facts and circumstances which must be specially replied, and cannot be given in evidence under a general traverse of the enjoyment as of right and without interruption for the periods named in the Prescription Act.—By the fifth section of the Prescription Act, 2 & 3 William 4, c. 71 (ante, p. 40), it is enacted that if the party resisting the claim "intends to rely on any proviso, exception, incapacity, disability, contract, agreement, or other matter thereinbefore mentioned, or on any cause or matter of fact or of law not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation. The greatest difficulty," observes Lord Denman,

(z) *Clayton v. Corby*, 2 Q. B. 825.(a) *Beasley v. Clarke*, 3 Sc. 263.(b) *Kinloch v. Neville*, 6 M. & W. 795; ante, pp. 27, 41-51.

“arises from the language of the concluding paragraph of this fifth section of the Prescription Act, and more particularly from the words, ‘or any cause or matter of fact or of law not inconsistent with the simple fact of enjoyment.’ As all these matters are required to be specially pleaded, and forbidden to be given in evidence, under a general traverse of the enjoyment as of right, it is plain that they are treated by the legislature as consistent with such an enjoyment; and as by the rules of pleading and of logical reasoning, every allegation by way of answer which does not deny the matter to which it is proposed as an answer is taken to confess it, we must conclude that the legislature used the words ‘as of right’ in such a sense as that a party confessing the enjoyment as of right for forty years, or twenty, as the case may be, may account for and avoid the effect of it by alleging, in the one case, a consent or agreement, provided it be by deed or writing (see sec. 2), and in the other, any contract, &c. written or parol (see sec. 5). It follows that the words ‘as of right’ cannot be confined to an adverse right from all time, as far as evidence shows; for if they were so confined, such enjoyment, once confessed, could not be avoided by replying that it was held by contract which is not adverse. Again, as the legal right to a way cannot pass except by deed, it is plain that the words ‘enjoyment as of right’ cannot be confined to enjoyment under a strict legal right, for then a ‘consent or agreement’ in ‘writing,’ not under seal, of which the second section speaks, could not account for such enjoyment. The words, therefore, must have a wider sense; and yet they must have the same sense as the words ‘claiming right thereto,’ in the second section, otherwise there will be incongruities in the construction of the act. It seems, therefore, that the enjoyment as of right must mean an enjoyment had, not secretly or by stealth, or by tacit sufferance, or by permission asked from time to time, on each occasion, or even on many occasions, of using it, but an enjoyment had openly, notoriously, without particular leave at the time, by a person claiming to use it, without danger of being treated as a trespasser, as a matter of right, whether strictly legal by prescription and adverse user, or by deed conferring the right, or, though not strictly lawful to the extent of excusing a trespass, as by a consent or agreement in writing, not under seal, in case of a plea for forty years, or by such writing, or parol consent or agreement, contract, or license, in case of a plea for twenty years (ante, p. 41). According to this view of the act, a license in writing must be replied to a plea of forty years’ enjoyment, if it cover the whole time, and the same of a parol license, in case of a plea for twenty years” (c).

Replication of the existence of a tenancy-for-life during part of the period of enjoyment relied upon by the plea.—Where there has been a thirty years' notorious enjoyment of a profit à prendre during a tenancy-for-life had with the knowledge and acquiescence of the owner of the fee, so as to be an enjoyment as of right within the statute against the inheritance (ante, pp. 52, 53), the tenancy-for-life must be specially pleaded by the reverser, in order to exclude such thirty years' enjoyment from the computation of the prescriptive period under the statute. Thus where, in an action of trespass, the defendant pleaded an uninterrupted user and enjoyment of a profit à prendre for thirty years under s. 1 of 2 & 3 Wm. 4, c. 71, and the plaintiff, by his replication, traversed the enjoyment, and the defendant, at the trial, proved enjoyment for thirty years next before the action, it was held that the plaintiff was not at liberty to prove a tenancy-for-life during part of those thirty years, as he had not set it up, and relied upon it by his replication (*d*).

Rejoinder traversing the fact of the existence of the tenancy-for-life during part of the period of enjoyment.—If a tenancy-for-life during the thirty years' period be replied and traversed by the rejoinder, the defendant may insist that the thirty years' enjoyment alleged in the plea is made up of time preceding and following the tenancy-for-life (*e*).

Evidence at the trial—Proof of trespass.—Under the plea of not guilty, the plaintiff must be prepared to prove the commission, by the defendant, his servants or agents, of the trespass of which he complains (*f*). Where it was proved that the plaintiff was tenant of certain rooms in the defendant's house, and that the defendant unlawfully locked the door and kept him out, it was held that the jury might infer that there had been an actual entry by the defendant into the plaintiff's rooms, so as to support an allegation in a declaration that the defendant broke and entered the rooms of the plaintiff and expelled him therefrom (*g*). To fix the defendant with a trespass committed by the hand of another, it must be proved that the act was done by command of the defendant, or that it was done for his benefit, and that he subsequently adopted and ratified the act (*h*).

Where the declaration alleged that the defendant entered the plaintiff's dwelling-house, and continued therein for eight days, it was held that the plaintiff was entitled to show a trespass committed by the defendant in the dwelling-house on any of those days, and that the plaintiff need not

(*d*) *Pye v. Mumford*, 11 Q. B. 675; ante, pp. 51, 52.

(*e*) *Clayton v. Corby*, 2 Q. B. 813; ante, p. 52.

(*f*) Ante, p. 159. Com. Dig. TRESPASS.

(*g*) *Lane v. Dixon*, 3 C. B. 776.

(*h*) Post, ch. 19.

prove that the defendant continued there the whole time; but, when various subsequent acts of trespass are given in evidence, it ought to appear that they were all in continuation, or in furtherance of the original wrongful act (i).

Proof under a traverse of the plaintiff's possession, or right of possession, of the locus in quo.—If the defendant, by his plea, denies the plaintiff's possession, or right of possession, of the *locus in quo*, the plaintiff must be prepared with general evidence of actual or constructive possession at the time of the commission of the alleged trespass. If the soil and freehold of the *locus in quo* are proved to be in the plaintiff, the possession is also presumed to be in him, unless there be some evidence to the contrary (k), for possession follows the property when there is no actual possession in another person (l). Actual or constructive possession, without proof of any title to the soil and freehold, is quite sufficient to support an action against a wrong-doer; for he who commits a trespass upon the possession of another, being himself a wrong-doer, has no right to put the other party to proof of title. A lessee of the vesture or herbage, or a purchaser of growing crops, who has a right to the use of the land for bringing the crops to maturity, and has, consequently, an interest in the soil, may maintain an action for a trespass upon his close or land against any person who wrongfully comes upon the land, or interferes in any way with the growing crops (m); but a purchaser of crops arrived at maturity, who has bought them with a view to immediate severance as chattels, and has no interest in the soil, cannot maintain an action for a trespass upon the land, but must confine his cause of action to a claim for damages for an injury to goods and chattels (n).

Very slight evidence of possession is sufficient to establish a *prima facie* title to sue for an injury to realty, such as the occupation of the soil with stones and rubbish, which have been placed thereon by order of the plaintiff, and kept there for some short time without molestation, or the building of a wall, or a dam, mound, or fence, which goes on for some weeks without interruption, and is then knocked down (o); or the inclosure or cultivation of a piece of waste ground, the mowing of the grass thereof, or the pasturing of a cow thereon for mere occupancy of land, however recent, gives a good title to the occupier, whereon he may recover, as against all who cannot prove an older and better title in

(i) *Percival v. Stamp*, 9 Exch. 174.

(k) *Parke, B., Hebbert v. Thomas*, 1 C. M. & R. 864.

(l) *Rex v. Mayor, &c. of London*, 4 T. R. 26.

(m) *Crosby v. Wadsworth*, 6 East, 609.

(n) *Parker v. Staniland*, 11 East, 366.
Evans v. Roberts, 5 B. & C. 837.

(o) *Every v. Smith*, 26 Law J., Exch. 345. *Dyson v. Collick*, 5 B. & Ald. 600; 1 D. & R. 225.

themselves (*p*). The digging of pits in a common, and throwing out heaps of earth, are *prima facie* proof of ownership of the heaps cast out, so as to support an action against a wrong-doer for carting away the heaps (*q*).

A mere intruder may have a possession sufficient to enable him to maintain an action against a person who does an injury to that possession; but he cannot maintain any action in which it would be necessary to prove title (*r*).

To maintain the action, however, there must in all cases be proof, either of title or of actual or constructive possession by the plaintiff at the time the trespass was committed. Where, therefore, the plaintiff held some marsh-land under a tenant-for-life, so that his interest ceased on the death of the tenant-for-life, and at the time of the determination of the life-interest, and down to the time of the commission of the trespass, and the commencement of the action, the plaintiff had no servants or cattle, or anything upon the land to show that he continued in possession of it, it was held that there was no proof that he was possessed of the land, and that his action was not maintainable (*s*).

Where certain commissioners of sewers placed a dam in a publick navigable river, the soil or bed of which was not vested in them, it was held that they had no such possession of the dam as would enable them to maintain an action against a wrong-doer for pulling it down (*t*). But if it be proved that contractors or commissioners of publick works have got the permission of the owner of the soil for the erection of their works, or it be shown that they and their servants were in the actual possession of the works at the time of the commission of the trespass, this will be sufficient to enable them to maintain the action (*u*).

Where a landowner gave the plaintiff license or permission to build a bridge on the land of such landowner, for the use of the publick, and the plaintiff built the bridge, and the defendant afterwards removed the parapets and carried away the stones, it was held that, on the severance of the stones from the land, they became chattels, the property in which was vested in the plaintiff, and that he was entitled to maintain an action against the defendant for carrying them away (*x*).

Navigation commissioners authorized by statute to make a river navigable and form towing-paths, on making compensation to the adjoining landowners, but who are not authorized to acquire, or have not

(*p*) *Catteris v. Cowper*, 4 Taunt. 547.
Matson v. Cooke, 6 Sc. 184; 4 Bing. N. C. 392.

(*q*) *Northam v. Bowden*, 11 Exch. 72.

(*r*) *Harper v. Charlesworth*, 4 B. & C. 589.

(*s*) *Brown v. Notley*, 3 Exch. 221; 18 Law, J., Exch. 39.

(*t*) *Duke of Newcastle v. Clark*, 8 Taunt. 621.

(*u*) *Dyson v. Collick*, 5 B. & Ald. 600.

(*x*) *Harrison v. Parker*, 6 East, 164.

acquired, the fee simple and ownership of the soil of the towing-path, have no such possession of the towing-path as will enable them to maintain an action for a trespass for cutting down trees growing in the soil of the towing-path (*y*).

Proof of possession of the key of a building is no proof of the possession of the building itself (*z*).

If the plaintiff has come into the possession of the land after the trespass was committed, the trespass is not a trespass against him, and he cannot maintain an action in respect of it (*a*), unless it is a continuing trespass (*b*).

Heir-at-law.—To sustain an action by an heir-at-law for trespasses committed upon land descended to him, where he is not in possession of the land, but the action is brought against a trespasser who contests his title, there must be proof of entry by the heir, and, after entry, his right of possession relates back, so as to support an action against a wrongdoer for a trespass committed at an antecedent period (*c*).

Proof of disseisin and re-entry.—If one disseises me, and during the disseisin he cuts down the trees or grass, or the corn growing upon the land, and afterwards I re-enter, I shall have an action of trespass against him for the trees, grass, corn, &c.; for, after my regress, the law, as to the disseisor and his servants, supposes the freehold always continued in me (*d*). By his re-entry the disseisee is remitted to his first possession, as if he had never been out of possession (*e*). A person, therefore, who has the freehold and a right to the possession of land may, by a peaceable entry upon the land, acquire sufficient possession of it to enable him to maintain an action for a trespass against any person who, being in possession at the time of his entry, wrongfully continues upon the land (*f*). It is not necessary that the party who makes the entry should declare that he enters to take possession. It is sufficient if he does any act to show his intention, and, having regained constructive possession by his peaceable entry upon the unlawful possession of the occupier, and being entitled to treat the latter as a trespasser, all those who come upon the land without title, after such vesting of possession, are trespassers, and liable to be sued as such. If a landlord, having a right to the possession of land on the expiration of a lease, sends his agent to the land to demand possession, and the agent enters and makes the demand, this is a sufficient entry to clothe the landlord with the constructive possession, so as to enable him to sue in trespass

(*y*) *Hollis v. Goldsitch*, 1 B. & C. 218; ante, pp. 32, 153, 154.

(*z*) *Revett v. Brown*, 5 Bing. 7.

(*a*) *Pilgrim v. Southamp. &c. Rail. Co.*, 19 Law, J., C. P. 382

(*b*) *Holmes v. Wilson*, 10 Ad. & E. 508.

(*c*) *Barnett v. Earl of Guildford*, 24 Law, J., Exch. 281; 11 Exch. 19.

(*d*) *Liford's case*, 11 Co. Rep. 51a.

(*e*) *Hulcome v. Rawlins*, Moore, 461.

(*f*) *Butcher v. Butcher*, 7 B. & C. 402; 1 M. & R. 220. *Litchfield v. Ready*, 5 Exch. 939.

all persons who subsequently come upon the land by the authority of the tenant (g).

Evidence for the defence.—Under a traverse of the allegation in the declaration for a trespass, that the close was the close of the plaintiff, the defendant is at liberty to show title in himself, or some other person under whose authority he claims to have acted (h).

If the defendant relies upon a plea of *liberum tenementum* (ante, p. 161), he must prove that the land whereon the alleged trespass was committed was his own soil and freehold, and that he was entitled to the possession of it as against the plaintiff. By this plea the defendant admits, as we have seen, that the plaintiff is in possession, and that he himself is, *prima facie*, a wrong-doer; but he undertakes to show a title in himself which shall do away with the presumption arising from the plaintiff's possession. He may do this either by showing title by deed in the usual way, or by proving a possessory title for twenty years (i). If, under this plea, the defendant establishes a title to that part of the close on which the alleged trespass was committed, he will be entitled to a verdict; for he is not bound to prove a title to the whole close, unless he has upon the record expressly undertaken to prove the whole close to be his soil and freehold (k).

When the plaintiff has in his declaration described by name or by abutments the close in which, as he alleges, the trespass was committed, and the defendant pleads *liberum tenementum* generally, the defendant cannot, by showing that he himself is possessed of a close of the same name and in the same vill, turn the plaintiff round, and prevent him from proving a trespass in his own close, as named in the declaration (l). The defendant must make out his title to the freehold on the very spot described in the declaration; and, on his proving a *prima facie* right to enter the close because it is his freehold, it will be competent to the plaintiff to prove that it has been demised to him, and to show his lease, if he have one (m). Where separate trespasses are alleged to have been committed in three different closes specifically described in the declaration, and the defendant, by his plea, says, in effect, that each of them was his own soil and freehold, the issues will be taken distributively, so that the plaintiff may have a verdict as to one close, and the defendant as to another (n).

Proof of leave and license.—If the defendant relies upon a plea of leave and license, he must prove either an express permission from the

(g) *Hey v. Moorhouse*, 8 Sc. 168; 6 Bing. N. C. 52.

(h) *Jones v. Chapman*, 2 Exch. 812.

(i) *Brest v. Lever*, 7 M. & W. 595.

(k) *Smith v. Royston*, 8 M. & W. 386.

(l) *Cocker v. Crompton*, 1 B. & C. 491.
Lemprière v. Humphrey, 3 Ad. & E. 186.

(m) *Harvey v. Brydges*, 14 M. & W. 441; 1 Exch. 261.

(n) *Phythian v. White*, 1 M. & W. 323.

plaintiff to the defendant to come upon the land (*o*), or circumstances from which such a permission may fairly be implied (*p*). A licensee can, of course, take no better title or authority than the licensor himself possesses; and, therefore, if one tenant-in-common gives to the defendant license or permission to dig and carry away soil, or brick earth, or turf, from the estate holden in common, this will give the defendant no right or title as against the other co-tenant-in-common, and will afford no answer to an action brought by the latter for a trespass (*q*). If the license or permission of the wife, daughter, or servant of the plaintiff, has been obtained by the defendant, this will be no evidence of a license from the plaintiff, unless the surrounding circumstances show that the wife, daughter, or servant had the plaintiff's express or implied authority to grant the license (*r*). Under a general plea of leave and license, the defendant is bound to prove a license co-extensive with all the acts of which the plaintiff complains; for if some of these acts are not covered and authorized by the license, the plaintiff will be entitled to damages in respect of them. A license to a defendant to have the key of a house, and to enter it when he pleases, will not authorize the defendant to enter the house otherwise than by the door, in the ordinary way. If, therefore, the defendant, having lost the key, enters the house by a window, he commits a trespass; and if evil-disposed persons, following his example, get into the house through the same window, and rob the house, the defendant will be responsible for the damage done (*s*).

Where a man is licensed to do a thing, it necessarily implies that he may do everything without which the thing authorized to be done cannot be done (*ante*, pp. 30, 31). If, therefore, the plaintiff has authorized the defendant to sell furniture and effects in the plaintiff's house, the license extends to all such assistants as may be necessary to enable the plaintiff to effect the sale and remove the goods (*t*). A plea of leave and license is not supported by proof that the plaintiff sold to the defendant certain goods and chattels which were deposited on the plaintiff's premises, and that the defendant entered upon the premises to remove the goods, for there is no implied authority to a purchaser to enter upon the vendor's land and help himself to the goods. There must be an express agreement to that effect (*u*).

A license obtained by wilful misrepresentation and deceit is a mere nullity, and will not justify or excuse a trespass by a defendant who was

(*o*) *Kavanagh v. Gudge*, 7 M. & Gr. 316; *ante*, pp. 23, 24.

(*p*) *Dilcham v. Bond*, 3 Campb. 524.

(*q*) *Wilkinson v. Haygarth*, 12 Q. B. 846.

(*r*) *Taylor v. Fisher*, Cro. Eliz. 246.

Holdingshaw v. Rag, *ib.* 876.

(*s*) *Ancaster v. Milling*, 2 D. & R. 714.

(*t*) *Dennett v. Grover*, Willes, 195.

(*u*) *Williams v. Morris*, 8 M. & W. 486.

a party to the misrepresentation (*x*). And if there has been a mistake and misunderstanding between the parties without fraud, the license will be a nullity (*y*), but the misunderstanding will go in reduction of damages in an action for the unintentional trespass. Under a replication denying the fact of the license, the plaintiff may prove that it was revoked, with notice to the defendant prior to the commission of the trespass (*z*). A parol license to enjoy an easement over or upon the soil and freehold of another is at once determined by a transfer of the property, and the grantee of the license is consequently a trespasser if he afterwards enters upon the land in the exercise and enjoyment of his supposed right, although he has received no notice of the transfer (*a*).

Proof of pleas of justification.—If the defendant has pleaded a plea justifying the trespass in the exercise of a privilege, profit à prendre, or easement, he must prove his right or title to the enjoyment of the incorporeal hereditament, either under an express or implied grant (*ante*, pp. 23–38), or by prescription (*ante*, pp. 39–51); and he must make out his justification as to that part of the close named in the declaration in which the trespass is proved to have been committed (*b*); but it is not necessary, in support of pleas of user and enjoyment under the Prescription Act, to show an actual exercise of the right in the very spot, when it is parcel of a larger tract. It is sufficient to show user and enjoyment over the larger tract under such circumstances, that it may reasonably be inferred that the right extended over the whole of the larger tract, including the spot in question (*c*).

Proof of right of way—Pleas of justification.—If the defendant justifies in the exercise of a right of way (*ante*, pp. 31, 42, 56, 57, 61), he must prove a right co-extensive with the right claimed (*d*). If he proves a larger and more extensive right than he claims, but the right claimed is included in the more extended right proved, there is, as we have seen (*ante*, p. 70), no variance. Thus, a plea of a right of foot-way is supported by proof of a right of way for carts or carriages, as a carriage-way always includes a foot-way (*e*). A plea of a right of way in the occupiers of certain premises may be established by proof that the defendant is seized of a freehold or copyhold estate in such premises, and that they are in the occupation of a tenant to whom he has demised them; for a landlord may be constructively an occupier so as to give him a right to use a way appurtenant to his own premises, although those premises are in the

(*x*) *Roper v. Harper*, 4 Bing. N. C. 20.

(*y*) *Bridges v. Blanchard*, 1 Ad. & E. 551.

(*z*) *Adams v. Andrews*, 15 Q. B. 291.
Barnes v. Hunt, 11 East, 451; *ante*, pp. 23, 24.

(*a*) *Wallis v. Harrison*, 4 M. & W. 539

and see *ante*, pp. 25–27.

(*b*) *Bassett v. Mitchell*, 2 B. & Ad. 105.

Wood v. Wedgewood, 1 C. B. 277.

(*c*) *Peardon v. Underhill*, 16 Q. B. 123.

(*d*) *Brunton v. Hall*, 1 Q. B. 792.

(*e*) *Davies v. Stephens*, 7 C. & P. 571; *ante*, p. 70.

possession of a tenant. The landlord of a tenement to which a right of way is appurtenant may, while the tenement is in the occupation of a tenant, lawfully use the way to remove an obstruction, and to assert the right of way, or to view waste (ante, p. 128), or to demand rent, or for any other purpose connected with the exercise of his rights or duties as a landlord (f).

A justification of trespass, under a custom for all the inhabitants of a particular town to walk and ride over a close of arable land at all seasonable times in the year was holden bad, because it appeared that the trespass was committed when the corn was standing, and it was held that "seasonable time" was partly a question of law and partly of fact (g).

Proof of deviations extra viam in the case of private ways.—When a way has once been assigned, or a prescriptive right to go in any particular direction established, the course or direction of the way cannot be altered by one party without the consent of the other. A grant of a right of way to and from a particular dwelling-house, coach-house, and stables, will not enable the defendant to go to and from an adjoining spot which he can reach from the same line of road. If there be a grant of a way to a particular corner of a field, the grantee can go to no other part (h). Where T had a way over the close of H, and H ploughed and sowed his close, leaving a way in an unploughed place in the same close, it was held that T was not bound to use the new unploughed way, but was entitled to go where the ancient way was. H may, however, use the new way as long as it lies open; but if the owner afterwards stops up the new way, he has no right to remove the obstruction and pass along it (i). In the case of a publick highway out of repair, passengers have a right to go upon the adjoining land, but this is not the case with a private way. If the passenger deviates, he commits a trespass (k).

If a man has a right of way to a close called A, he cannot justify using the way to go to A, and from thence to another close of his own adjoining to A (l).

Proof of a publick right of way.—Nothing done by a lessee, without the knowledge or consent of the owner of the fee, will give a right of way to the publick. In order to give the publick that right, the privilege must be granted, or be exercised and enjoyed with the knowledge and acquiescence of the owner of the fee. If, therefore, a person having only a

(f) *Proud v. Hollis*, 1 B. & C. 9; 2 D. & R. 31.

(g) *Bell v. Wardell*, Willes, 202; ante, p. 18.

(h) *Henning v. Burnett*, 8 Exch. 193.

(i) *Horne v. Widdlake*, Yelv. 141; Noy, 128. *Reignolds v. Edwards*, Willes, 283.

Ante, p. 56.

(k) *Taylor v. Whitehead*, 2 Doug. 747. *Bullard v. Harrison*, 4 M. & S. 393.

(l) 1 Roll. Abr. 391. (CHIMIN. PRIVATE) cited *Allan v. Gomme*, 11 Ad. & E. 770.

limited interest in land, gives permission to the publick to traverse his land, the privilege can continue only for a limited period (*m*). There may be a highway, by dedication to the publick, where there is no thoroughfare. There may be a large square, with only one entrance to it, and if the owner allows the publick to use it without restriction for a great many years, he cannot afterwards turn round and say they were all trespassers. Where there was a publick street, and at the side of it a passage leading to a court, consisting of fifteen houses, all of which belonged to the plaintiff, but the court had been freely used by the publick for many years without restriction, it was held that this was evidence from which a jury might find a dedication to the publick, although the court and thoroughfare had originally been made for the use of the occupiers of the houses, and led only to their dwellings (*n*). A highway, therefore, may exist, though it is not a thoroughfare. But if a road be made for the accommodation of particular persons only, it is not a publick road, and there is no reason why the inhabitants in a street which is not a thoroughfare should not put up a fence at the end of it, and exclude the publick (*o*).

The publick can take no larger or more extensive right of way than the owner of the fee thinks fit to grant or to allow. "They must take *secundum formam doni*, and if they cannot take according to that, they cannot take at all (ante, p. 101). If a restriction cannot by law exist as to a publick way, then the grant is only a license revocable." Where, therefore, a landowner suffered the publick to use for several years a road through his estate for all purposes except that of carrying coals, it was held that this was either a limited dedication of the road to the publick, or no dedication at all, but only a license revocable; and that a person carrying coals along the road, after notice not to do so, was a trespasser (*p*).

Proof of a right of way over vacant or waste strips of land extending alongside a publick thoroughfare.—"When," observes Lord Tenterden, "I see a space of fifty feet, through which a road passes between enclosures set out under an act of parliament, I am of opinion that, unless the contrary be shown, the public are entitled to the whole of that space, although, perhaps, from economy, the whole may not have been kept in repair. If it were once held that only the middle part, which carriages ordinarily run upon, was the road, you might by degrees enclose up to it, so that there would not be room left for two carriages to pass. The

(*m*) *Wood v. Veal*, 5 B. & Ald. 456.

(*n*) *Baleman v. Black*, 21 Law, J., Q. B. 407.

(*o*) *Best, J., Wood v. Veal*, 5 B. & Ald.

457.

(*p*) *Marquis of Stafford v. Ooyney*, 7 B. & C. 257.

space at the sides is also necessary to afford the benefit of air and sun" (q).

Proof of entry on the plaintiff's land for the purpose of depositing thereon the plaintiff's own goods, or removing therefrom the goods of the defendant.—In Roll's Abridgement it is said, "If a man comes into my close with an iron bar and sledge, and there breaks my stones, and after departs and leaves the sledge and bar in my close, in an action for trespass for taking and carrying of them away, I may justify the taking of them and putting them in the close of the plaintiff himself next adjoining, especially giving notice of it to the plaintiff, inasmuch as they were brought into my close of his own tort; and in such case of tort I am not bound to carry them to the pound, but may well remove the wrong done to myself by them by tort of the plaintiff" (r). An entry on the plaintiff's land may be justified on the ground that the plaintiff took the defendant's goods and carried them on to his own land, wherefore the defendant entered upon the plaintiff's land and took his goods back again (s); but the entry is not justifiable from the mere fact of the plaintiff's goods being on the defendant's land. It must be shown that they came there by the plaintiff's act (t).

Of the damages recoverable in actions for trespasses upon real property.—All damages which naturally result from the wrongful act of the defendant, and are directly traceable thereto, may be recovered by the plaintiff, if he claims them in the declaration (u). Where the plaintiff, being desirous of letting his house, placed the key under the control of the defendant, and the key having been carried away, the defendant got a ladder and entered the house through a bed-room window which had no fastenings, and showed some strangers over the house, and a few nights afterwards the house was entered, apparently by the same window, and valuable property of the plaintiff was stolen, it was held that the defendant was responsible in an action of trespass for the loss the plaintiff sustained by the robbery (x).

Trespasses on land after notice or warning not to trespass.—*Surrounding circumstances of aggravation* will materially influence the amount of damages to be recovered for a trespass upon land. Where the plaintiff, a gentleman of fortune, was shooting upon his estate, and the defendant, a banker and magistrate, and member of parliament, went up to the plaintiff and told him he would join his shooting-party, and the plaintiff

(q) *Rea v. Wright*, 3 B. & Ad. 683; ante, p. 158.

(r) *Cole v. Maundy*, 1 Roll. Abr. TRESPASS, 1 pl. 17, p. 566. *Rea v. Sheward*, 2 M. & W. 426.

(s) 3 Vin. Abr. TRESPASS, 1.

(t) *Patrick v. Colerick*, 3 M. & W. 485.

Anthony v. Haney, 1 M. & Sc. 306; 8 Bing. 180. *Williams v. Morris*, 8 M. & W. 486.

(u) Ante, pp. 14, 15, 72, 73, 115–117; and post, ch. 21.

(x) *Ancaster v. Milling*, 2 D. & R. 714.

declined, and ordered him off his land, and gave him notice not to shoot there ; but the defendant swore that he would shoot there, and did so, and threatened and defied the plaintiff, and the jury gave 500*l.* damages, the Court refused to disturb the verdict. " I do not know," observes Gibbs, C. J., " upon what principle we can grant a rule for a new trial in this case, unless we were to lay it down that the jury are not justified in giving more than the absolute pecuniary damage that the plaintiff may sustain. Suppose a gentleman has a paved walk in his paddock before his window, and that a man intrudes and walks up and down before the window, and remains there after he has been told to go away, and looks in while the owner is at dinner, is the trespasser to be permitted to say, ' Here is a halfpenny for you, which is the full extent of all the mischief I have done,' would that be a compensation " (y) ?

Where a landlord entered upon premises demised to his tenant, without asking the leave of the latter, and sold the timber-trees standing in the hedge-rows, and caused them to be felled, and cut up, and removed, and great damage was done to the growing crops of the tenant, and the latter brought an action against the landlord for damages, and recovered 100*l.* beyond the net value of the whole of the crops, the Court declined to interfere to have the amount of damages reconsidered, although they were of opinion that the jury had taken an exaggerated view of them (z).

Damages in respect of trespasses in dwelling-houses.—The law guards with great jealousy and watchfulness the peaceable possession by every man of his dwelling-house, and enables all who have been disturbed in the enjoyment thereof to recover substantial damages from every wilful and intentional intruder, though no actual pecuniary damage can be proved to have been done in point of fact either to property or the person (a). " Rights of action of this sort are given," observes Lord Denman, " in respect of the immediate and present violation of the possession of the plaintiff, independently of his right of property ; they are an extension of that protection which the law throws around the person, and substantial damages may be recovered in respect of such rights, though no loss or diminution in the value of property may have occurred (b).

Assessment of damages in cases of injury to buildings.—The amount of damages to be recovered in an action of tort for the wrongful and malicious demolition of a house in the actual occupation of the owner, seems to be peculiarly for the consideration of a jury. The question for them to determine is, what sum of money will repair the injury done to the plaintiff

(y) *Merest v. Harvey*, 5 Taunt. 441.

(z) *Williams v. Currie*, 1 C. B. 847.

(a) *Sears v. Lyons*, 2 Stark. 318.

(b) *Rogers v. Spence*, 13 M. & W. 581.

by the loss of his house, and what sum will be required to replace the house, as nearly as practicable, in the situation and state in which it was at the time of the commission of the injury (c).

Assessment of damages for digging and carrying away coal and earth.— In an action for a trespass in taking away the plaintiff's coal, he is entitled to recover the value of the coal at the time of its severance from the soil, and the trespasser cannot claim any deduction therefrom in respect of the expense incurred by him in getting the coals (d), unless there is a real disputed title. This value is the sale price at the pit's mouth, after deducting the expense of carrying the coals from the place in the mine where they were got to the pit's mouth. The plaintiff is also entitled to compensation for all injury done to his soil by digging, and for the trespass committed in dragging the coal along the adit of his mine. The estimate of the loss from the removal of the coal depends upon the value of the coal at the time of its severance from the soil; and the defendant has no right to any deduction in respect of royalty payable by the plaintiff to the mine-owner on coals got from the mine (e).

Where an action was brought for digging into the plaintiff's close, and carrying away therefrom large quantities of earth, soil, &c., it was held that the plaintiff was entitled, by way of compensation, to what the land was worth to him, and not to the amount which would be required to enable the plaintiff to replace the soil which had been taken away (f).

Assessment of damages in respect of trespasses by diseased cattle.— If, in consequence of an unlawful entry of diseased cattle into the plaintiff's close, the plaintiff's cattle have become infected with the disease, this is matter of aggravation of damages, and may be recovered, if claimed in a declaration for the trespass (g).

Assessment of damages where the plaintiff has no certain or determinate interest in the property.— If the plaintiff is only tenant-on-sufferance or tenant-at-will, the damages may be merely nominal. Where a trespass, of which the plaintiff complained, consisted in pulling down a wall between the close of the plaintiff and an adjoining close of the defendant, in the doing of which a few bricks and some mortar fell upon the plaintiff's land, and no evidence was given as to the nature of the plaintiff's interest in the premises, and the jury gave 1s. damages, it was held, that as the plaintiff had not proved that he had any interest in the land beyond that which results from the bare possession, he had not shown himself to be entitled to any greater damages than the jury had given (h). But where the plaintiff

(c) *Duke of Newcastle v. Hundred of Broxtowe*, 4 B. & Ad. 282.

(d) *Martin v. Porter*, 5 M. & W. 352.

(e) *Wild v. Holt*, 9 M. & W. 672.

Morgan v. Powell, 3 Q. B. 283.

(f) *Jones v. Gooday*, 8 M. & W. 146.

(g) *Anderson v. Buckton*, 1 Str. 192.

(h) *Twyman v. Knowles*, 13 C. B. 224.

proves that he is in the actual occupation and possession of the land and crops growing thereon, he will be entitled to recover exemplary damages from trespassers who wrongfully enter upon the land, and trample down and injure the crops, although he is only tenant-at-will; for if a stranger subvert land leased at will, the lessee may bring an action against him and have damages for the profits; and the lessor may have another action, and recover damages for the destruction of the land (*i*). But as the injury consists of two parts, an injury to a temporary right in the lessee and to the permanent freehold of the lessor, the damages must be assessed with reference to their several interests; for where different persons have distinct rights in the subject-matter of a trespass, the compensation must be to each in proportion to the injury he has received. One of them cannot claim that part of the compensation which belongs to another; nor can the satisfaction made to one be a bar to an action brought by the other (*k*).

Apportionment of damages as between tenant and reversioner (l).—In the case of injuries to trees, the damages from the immediate loss of the shade and fruits of the trees are recoverable by the occupier or lessee; the damage from the loss of the timber and body of the tree falls to the reversioner (*m*). To entitle the reversioner to damages, it must be shown that the trespass or injury for which he sues is of a permanent nature; for he is not entitled to sue, as we have seen (*ante*, pp. 10, 63–65, 105, 106), in respect of mere temporary trespasses, where the repetition of the act, without interruption, would not destroy any right of the reversioner, or establish any adverse right against him: but if the injury complained of is a damage to the inheritance, so that if the reversioner wanted to sell the reversion, the injury would lessen the value of it, substantial damages are recoverable. In an action for an injury to the plaintiff's reversionary interest, by pulling down a house in the occupation of the plaintiff's yearly tenant, it was held that the diminution in the saleable value of the premises was the true criterion of damage, and that the jury should consider how much less the land was worth in consequence of the loss of the house (*n*). The cutting and carrying away soil is a permanent injury to the reversioner, and an infringement upon his proprietary right, though no actual damage be done to the land (*o*).

Damages recoverable from one of several co-trespassers.—Where, in an action for a trespass by the defendant, with horses, &c., upon the plaintiff's land, it appeared that the defendant was the huntsman of the Berkeley

(i) 2 Roll. Abr. 551.

(k) *Chambre, J., Attersoll v. Stevens*,
1 Taunt. 194.

(l) *Ante*, pp. 15, 73, 116.

(m) *Bedingfield v. Onslow*, 3 Lev. 211.

(n) *Hosking v. Phillips*, 3 Exch. 108.

(o) *Alston v. Scates*, 2 M. & Sc. 6; 9
Bing. 3.

hounds, and that he followed the hounds, accompanied by a large concourse of persons on foot and on horseback, over the plaintiff's land, and destroyed the fences, and injured the crops, Lord Ellenborough held that the defendant was answerable for the whole of the damage, and directed the jury not to estimate the damage according to the mischief which the defendant had individually occasioned by his trespass, but according to the aggregate amount of mischief done by him, and his co-trespassers, and the hounds (*p*).

Damages recoverable from tenants who hold over wrongfully after the expiration of a notice to quit.—Where a tenant holds over, after the expiration of a notice to quit, the landlord is entitled to recover from him any reasonable damages and costs that may have been sustained by him in an action at the suit of a party to whom he had contracted to let the premises, but to whom he was prevented from delivering possession through the wrongful act of such tenant (*q*).

(*p*) *Hume v. Oldacre*, 1 Stark, 352; and
see post, ch. 21.

(*q*) *Bramley v. Chesterton*, 2 C. B., N.
S. 605; post, ch. 21.

CHAPTER VI.

OF TRESPASS AND CONVERSION OF CHATTELS—TITLE TO CHATTELS PERSONAL.

SECTION I.—*Of the wrongful seizure and conversion of chattels.*—Trespasses upon personalty—What amounts to a conversion of chattels—Destruction of chattels—Wrongful purchases of chattels—Demand and refusal of goods—Conversion of chattels by railway companies and bailees—Conversion of bills and notes—Conversion by one of several partners, joint-tenants or tenants-in-common—Conversion by parties claiming a lien upon chattels—Extinguishment of liens.

SECTION II.—*Of the title to chattels personal.*—Title to chattels by finding, gift, purchase, and mortgage—Title to deeds, leases, bonds, and securities

—Colourable transfers—Title of innocent purchasers from fraudulent vendors—Title by delivery order, and by purchase from sheriffs—Title to bills and notes—Title of assignees, of bankrupts, and insolvents—Reputed ownership—Alteration of the right of property in chattels, after recovery of judgment in an action for a conversion of them.

SECTION III.—*Of actions for the conversion of chattels.*—Recapture of stolen property—Parties to actions—Staying proceedings—Pleadings, defences, and evidence—Damages recoverable in actions for the conversion of chattels.

SECTION I.

OF TRESPASS AND CONVERSION OF CHATTELS.

Trespasses upon personalty.—*Conversion of chattels.*—If a man, who has no right to meddle with goods at all, takes them and removes them from one place to another, an action may be maintained against him for a trespass, but he is not guilty of a conversion of them, unless he removed the goods for the purpose of taking them away from the plaintiff, or of exercising some dominion or control over them for the benefit of himself or of some other person. Thus, where the plaintiff and defendant, who were porters on the custom-house quay, had each small boxes in a hut on the quay, for storing small parcels of goods until they could be put on board ship, and the plaintiff placed some goods in the hut in such a manner that the defendant could not get to his box without removing

them, which he accordingly did, but forgot to put them back again, and the goods were lost, it was held that the defendant had a right to remove the goods, and so far was in no fault; but as he had not returned them to the place where he found them, there might be ground for an action for a trespass in meddling with them, but that there was no conversion of them, as the defendant had not in anywise disturbed the plaintiff's dominion or ownership over the property (*r*).

It has never yet been held that the single act of removal of a chattel, independent of any claim over it, either in favour of the party himself or any one else, amounts to a conversion of the chattel. If a gate has been wrongfully erected by the plaintiff, so as to obstruct the defendant's right of way, and the defendant pulls down and carries away the gate and places it on his own land, in a convenient situation for the plaintiff to fetch it away, if he thinks fit so to do, this does not amount to a conversion of the gate (*s*). "Suppose," observes Rolfe, B., "I, seeing a horse in a ploughed field, thought it had strayed, and, under that impression, led it back to pasture, it is clear that an action would lie against me for a trespass; but would any man say that this amounted to a conversion of the horse to my own use" (*t*)? "Scratching the panel of a carriage would be an act of trespass, but no conversion of the carriage" (*u*). But any asportation of a chattel for the use of the defendant or some third person is a conversion of it, because it is an act inconsistent with the general right of dominion which the owner of the chattel has in it, who is entitled to the use of it at all times and in all places.

If a man has possession of my chattel and refuses to deliver it up, this is an assertion of a right inconsistent with my general dominion over it, and the use which at all times and in all places I am entitled to make of it, and consequently amounts to an act of conversion (*v*). Therefore, if one man who is entrusted with the goods of another puts them into the hands of a third person, contrary to orders, it is a conversion. If a person, without my permission, take my horse to ride, and leave him at an inn, that is a conversion; for though I may have the horse on sending for him, and paying for the keeping of him, yet it brings a charge on me, and it is different from the case of a misdelivery of goods merely owing to a mistake (*x*). If one man enters the house of another, and takes an inventory of his goods, and gives him notice that they are distrained for rent and will be sold, this is evidence of a conversion (*y*). If one man takes the property of another without his consent, by abuse of the process of the law, this is

(*r*) *Bushel v. Miller*, 1 Str. 129.

(*s*) *Houghton v. Butler*, 4 T. R. 364.

(*t*) *Fouldes v. Willoughby*, 8 M. & W.

551.

(*u*) *Alderson, B.*, ib. 549.

(*v*) *Baldwin v. Cole*, 6 Mod. 212.

(*x*) *Syeds v. Hay*, 4 T. R. 264.

(*y*) *Neilau v. Hanny*, 2 Car. & Kirw.

710.
771 n.

Needham v. Rawbone, 6 Q. B.

an act of conversion (*z*). And if a party aids and assists in the sale of goods under a fraudulent and void warrant of attorney, he may render himself responsible for a conversion of the property (*a*).

If a sheriff sells more goods than are sufficient to satisfy an execution, he is liable for a conversion in respect of the excess. Whether he has sold more than was necessary is a question of fact in each particular case (*b*). But if a landlord distrains and carries away goods, and, after selling enough to satisfy the rent in arrear, returns the surplus to the demised premises from whence they were taken, there is no conversion by the landlord of any part of the property, he having dealt with it no otherwise than he was by law entitled to deal with it (*c*).

A mere negligent dealing with goods by a bailee to whom they have been delivered (post, ch. 8), is not a conversion of them. He may be liable to an action for negligence, but not to an action for a conversion, which only lies where some dominion is asserted by the defendant over the chattel which is the subject of the action. One who takes possession of goods unlawfully, which are in consequence lost to the owner, is, to a certain extent, guilty of a conversion; but where there is no unlawful taking of possession or assertion of dominion over the goods, although the goods may be destroyed, there is no conversion. If the goods of one man are consigned to another, whether rightfully or wrongfully, the consignee is justified in depositing them in a place of safe custody, and their destruction there without his default cannot make him guilty of a conversion (*d*).

Wrongful destruction of chattels amounting to a conversion.—The form of declaration for the conversion of chattels prescribed by the Common Law Procedure Act, 15 & 16 Vict. c. 76, sched. B., is, "that the defendant converted to his own use, or wrongfully deprived the plaintiff of the use and possession of, the plaintiff's goods." Every wilful and wrongful destruction of a chattel, or wilful and wrongful damage to it, whereby the owner is deprived of the use of it in its original state, is a conversion of it. Thus, the taking of wine from a cask, and filling the cask up with water, is a conversion of all the wine (*e*). If a bailee of a cask of wine consumes part of the wine, this, as against the wrong-doer, is a conversion of the whole of the wine; but the wrong-doer cannot himself set it up, and rely upon it as a conversion of the whole, so as to enable him in any way to take advantage of his own wrong (*f*). But to constitute a conversion by reason of the destruction of chattels by the defendant, it

(*z*) *Grainger v. Hill*, 5 Sc. 577; 4 Bing. 27 Law, J., Exch. 50.
N. C. 221.

(*a*) *Billiter v. Young*, 6 Ell. & Bl. 1.

(*b*) *Aldred v. Constable*, 6 Q. B. 381.

(*c*) *Evans v. Wright*, 2 H. & N. 527;

(*d*) *Heald v. Carey*, 11 C. B. 993.

(*e*) *Richardson v. Atkinson*, 1 Str. 577.

(*f*) *Pattenon, J., Philpott v. Kelley*, 8

Ad. & E. 106.

must be shown that he destroyed them with the intention of taking to himself the property in them, or deriving some benefit from them, or with the intention of depriving the plaintiff of the possession or use of them; for if the defendant, finding property belonging to the plaintiff encumbering his close, destroys it in endeavouring to remove it, without intending needlessly and wantonly to effect its destruction, this is no conversion of the property (*g*).

Conversion of chattels by purchasers without title.—According to Lord Holt, the very assuming to one's self the property and right of disposing of another man's goods is a conversion of them; "and certainly," observes Lord Ellenborough, "a man is guilty of a conversion who takes my property by assignment from another, who has no authority to dispose of it; for what is that but assisting that other in carrying his wrongful act into effect" (*h*) ?

When a demand of the goods, on the part of the plaintiff, and a refusal to deliver them by the defendant must be proved, in order to establish a conversion.

—When the chattels of the plaintiff have not been wrongfully taken possession of by the defendant, but have come into his hands in a lawful manner, he cannot be made responsible for a conversion of them until they have been demanded of him by the owner, or the party entitled to the possession of them, and he has refused to deliver them up. Whenever, therefore, the goods of one man have lawfully come into the hands of another, the owner, or party entitled to the possession of them, should go himself, or send some one with a proper authority, to demand and receive them; and if the holder of the goods then refuses to deliver them up, or permit them to be removed, there will be evidence of a conversion (*i*); for "whoever," observes Holt, C. J., "takes upon himself to detain another man's goods from him without cause, takes upon himself the right of disposing of them," and is guilty of a conversion (*k*). The demand and refusal do not in themselves constitute the conversion. They are evidence of a conversion at some previous period (*l*).

What is a sufficient demand and refusal, when a demand and refusal are necessary to be proved, in order to establish a conversion.—If, when goods are demanded, the parties in possession of them refuse to deliver them, except upon conditions which they have no right to impose, that is tantamount to an absolute refusal, and they are guilty of a conversion (*m*). If the party in possession of the goods says, when the goods are demanded of him, that he shall do nothing but what the law requires, and does not

(*g*) *Simmons v. Lillystone*, 8 Exch. 442; 22 Law, J., ib. 217.

(*h*) *McCombie v. Davies*, 6 East, 540.

(*i*) *Thorogood v. Robinson*, 6 Q. B. 772.

(*k*) *Baldwin v. Cole*, 6 Mod. 212.

(*l*) *Willon v. Girdlestone*, 5 B. & Ald. 847.

(*m*) *Davies v. Vernon*, 6 Q. B. 450.

Cobbett v. Clutton, 2 C. & P. 471.

produce or tender the goods, this is evidence of a conversion of them (*n*). But though he at first refuses, if he afterwards, and before a writ is issued against him, goes to the plaintiff and offers to deliver them up to him, the effect of the previous refusal is done away with, and there is then no evidence of a conversion (*o*). If the demand is for the delivery of an article to the plaintiff in some particular state and condition, a refusal to comply with the demand is not necessarily a conversion, as the defendant may not be bound, or may be totally unable, to deliver the article in the state required (*p*).

So if the demand is too large; if the plaintiff, being entitled to demand five beasts, requires seven, and the defendant refuses to give up seven, such a refusal is no evidence of a conversion of the five which were never demanded (*q*). If the goods are not in the possession and under the control of the defendant, he is not guilty of a conversion in refusing to deliver them. If, therefore, at the time of the demand, they have been distrained or attached under legal process, they are in the custody of the law, it is no longer in the defendant's power to deliver them up, and he cannot be made responsible for a conversion (*r*).

"Authorities are not wanting to show that a party is not guilty of a conversion because he does not at once restore the chattel, where it is not at the moment in his possession and under his own immediate control" (*s*). The ground of the action is a wrongful conversion, and there must be some evidence to show the defendant to be a tort-feasor. Where, therefore, all that appeared was that some wine-warrants, the property of the plaintiff, came to the hands of the defendant in her representative character as administratrix of her deceased husband, and she handed them over to her attorney, and when the plaintiff demanded them, she said they were in her attorney's hands, it was held that this was no evidence of a conversion (*t*).

If there be a demand in words, and also a demand in writing, both being perfect, either of them may be proved as evidence of the conversion (*u*).

Demand and refusal not amounting to evidence of a conversion—Goods not in the possession of the defendant at the time of the demand.—A man cannot be made a bailee (post, ch. 8) of goods against his will, and, therefore, if things come to be left at his house, or upon his land, without any consent or agreement on his part to take charge of them, he is not thereby made

(*n*) *Davies v. Nicholas*, 7 C. & P. 339.
 (*o*) *Hayward v. Seaward*, 1 M. & Sc.
 459.
 (*p*) *Rushworth v. Taylor*, 3 Q. B. 700.
 (*q*) *Abington v. Lipscomb*, 1 Q. B. 780.
 (*r*) *Verrall v. Robinson*, 2 C. M. & R.

495.
 (*s*) *Wilde, C. J., Towne v. Lewis*, 7 C.
 B. 611.
 (*t*) *Canot v. Hughes*, 2 Sc. 663; 2 Bing.
 N. C. 448.
 (*u*) *Smith v. Young*, 1 Campb. 439.

a bailee of them (*x*); and if the goods are demanded of him, and he will have nothing whatever to do with the goods, and will not touch or meddle with them in any way, such a declaration, in answer to a demand of the goods, is no evidence of a conversion of them (*y*). Where the defendant, on entering into possession of some premises which he had taken on lease, found thereon some timber which had been deposited there by the permission of the previous occupier, and the plaintiff, to whom the timber belonged, demanded it of the defendant, who said, "If you will bring any one to prove it is your property I will give it you, and not else;" it was held that this qualified refusal, taken in connexion with the surrounding circumstances, and the absence of all evidence of any intermeddling with the timber by the defendant, did not amount to evidence of a conversion (*z*).

Demand and refusal not being evidence of a conversion—Goods deposited in the hands of publick officers and bailees.—Where goods, which have been left at sea, are deposited in the hands of an admiral or publick officer, to be kept in his custody until salvage has been paid, and he refuses to give them up until it is ascertained whether salvage is due or not, such qualified refusal does not amount to a conversion (*a*). A servant, who has been intrusted with the custody of goods by his master, does not do his duty if he gives them up on the demand of a stranger, without a previous application to his master for instructions. A refusal, therefore, by a servant to deliver up goods he has received from his master, without an order or authority from the latter, is a qualified, reasonable, and justifiable refusal, and no evidence of a conversion (*b*). The servant has a right to say, "I received the goods from my master, and he ought to have an opportunity of admitting or rejecting your title, and of giving his instructions to me in the matter" (post, s. 2); but if, after having had an opportunity of receiving, or having received, the instructions of his master, he sets up, or relies upon, the title of the latter, and gives an absolute and unqualified refusal to deliver up the goods, he will then, if the person demanding the goods is entitled to the possession of them, be guilty of a conversion (*c*).

If the owner of goods has delivered them to a bailee (post, ch. 8) to keep for him, so that the bailee has received the goods under a valid title, and the bailor, subsequently to the bailment, has, by bill of sale, transferred all his interest to a stranger, who demands the goods of the bailee,

(*x*) *Lethbridge v. Phillips*, 2 Stark, 544.
Addison on Contracts, Title, DEPOSIT.

(*y*) *Hawkes v. Dunn*, 1 Cr. & J. 527.

(*z*) *Green v. Dunn*, 3 Campb. 218 n.

(*a*) *Clark v. Chamberlain*, 2 M. & W.
83. *Kerford v. Mendel*, 28 Law, J.,

Exch. 303.

(*b*) *Alexander v. Southey*, 5 B. & Ald.
249. *Mires v. Solebay*, 2 Mod. 245.

(*c*) *Lee v. Robinson*, 25 Law, J., C. P.
249.

and the latter refuses to deliver them up until he has had time to receive the directions of the bailor, there is no evidence of a conversion (*d*). In an action for a conversion of chattels, it was held by Lord Kenyon, that where the demand of the things for which the action is brought is not made by the owner, who deposited them with the defendant, but by another person on his account, and the defendant refuses to deliver them, on the ground that he does not know whether the things belong to him or not, and therefore keeps them till that is ascertained; or that the person who applies is not properly empowered to receive them, or until he is satisfied by what authority he applies, that is not such a refusal as is evidence of a conversion (*e*). But if he sets up the title of his bailor, and affirms him to be the owner, or gives an absolute, unqualified refusal to deliver up the chattels, there is, as we have seen, evidence of a conversion.

Where a pony-chaise was delivered to a workman to be painted, and the latter deposited it in the hands of a party who refused to deliver it up to the owner, unless the latter either produced the person who placed the chaise in his hands, or an order from him for its delivery, it was held that the owner was entitled to the possession of his property, without doing either the one or the other (*f*).

If a bailor has no title at the time of the bailment, the bailee can have none, for the bailor can give no better title than he has himself. The right to chattels personal, therefore, may be tried in an action against the bailee; but the situation of the bailee, in cases of disputed ownership to goods in his hands, is not one without remedy. He is not bound to ascertain who has the right. He may, as we shall see (post, ch. 8, s. 2), file a bill of interpleader in a court of equity; or if he is sued in the superior courts, or the county palatine courts, he may obtain relief under the statute of 1 & 2 Wm. 4, c. 58 (post, ch. 8, s. 2), which enables defendants sued in those courts to obtain a stay of proceedings in the action until the rights of the adverse claimants are ascertained by a judicial decision in the manner therein provided. If the bailee forbears to adopt one or other of these modes of proceeding, and makes himself a party in the matter by retaining the goods for the bailor, he must stand or fall by the title of the latter (*g*).

Conversion of goods by railway companies—Demand and refusal.—If goods are brought by mistake, and without right, and delivered at a railway station, the station-master has no right to detain them after demand by

(*d*) *Lee v. Bayes*, 18 C. B. 607; 25 674.
Law, J., C. P. 249.

(*e*) *Solomons v. Dawes*, 1 Esp. 82.

(*f*) *Buxton v. Baughan*, 6 C. & P.

(*g*) *Ld. Tenterden, Wilson v. Anderton*,
1 B. & Ad. 456. *Atkinson v. Marshall*, 12
Law, J., Exch. 117.

the owner, and the tender of any reasonable expenses due upon them. Where, therefore, a station-master said, in answer to a demand of some goods, "The goods were brought to our station by an intermediate line, which has no right to send goods here, and I shall send them back," it was held that the railway company was liable for the conversion of the goods (*h*). But, in order to fix the company, it must be shown that the wrongful act was done by their authority, that is, by some person acting for them within the scope of his authority (*i*).

Conversion of bills and notes.—A man who holds a bill of exchange for a particular purpose has no right, without authority, to go and receive money on the bill, and if he does so, he is responsible for a conversion of the instrument (*k*). If, therefore, a bill of exchange or negotiable security is delivered into the hands of an agent or mandatary, that he may get it discounted, and he neglects to do so, and pays away the bill or note in furtherance of his own purposes, he is responsible for a conversion of the security (*l*); but if he pursues the authority given him, and gets the bill discounted, but misapplies the proceeds, he is not responsible for the conversion of the security, but for the misapplication of the money (*m*).

If a party takes a bill or note after it becomes due, or under such circumstances of suspicion as should have prompted inquiry, he takes it with all its infirmities, and with the risk of its having been lost or stolen (*n*).

Conversion of lost or stolen bank-notes or negotiable securities by bankers and others who have negligently or fraudulently discounted or cashed them.—*Notices and advertisements of the loss of notes or negotiable securities.*—If bankers or any other persons change or discount bank-notes or bills of exchange, or negotiable securities of great value, payable to bearer, receiving them into their possession from the hands of strangers, without any inquiry, and without due caution, and the bill or note should turn out to have been lost or stolen, they will be responsible to the owner for the value of the security (*o*). "The law should be such," observes Abbott, C. J., "as not to impede the circulation of notes, on the one hand, and not to give encouragement to theft and fraud, by allowing too great a facility in disposing of stolen property, on the other. If a person takes a Bank-of-England note under circumstances which might awaken suspicion in the mind of a reasonable man acquainted with business, and which ought to cause him to make inquiries, and he forbear to do so, he

(*h*) *Rooke v. Mid. Rail. Co.*, 16 Jur. 1009.

(*i*) *Glover v. Lond. & N. W. &c.*, 5 Exch. 66.

(*k*) *Alsager v. Close*, 10 M. & W. 583.

(*l*) *Crunch v. White*, 1 Bing. N. C. 414.

Atkins v. Owen, 4 Ad. & E. 819.

(*m*) *Palmer v. Jarmain*, 2 M. & W. 282.

(*n*) *Goggerley v. Cuthbert*, 2 N. R. 170.

(*o*) *Easley v. Crockford*, 3 M. & Sc. 700; 10 Bing. 243.

cannot hold the proceeds of such note from the person who has lost it." And if bankers conduct their business in such a manner as to hold out temptation to persons unlawfully possessed of property to pass it to them, if they cash and receive notes of considerable value from strangers, without asking who brings the notes, or who receives the money given in exchange, and do not enter either the numbers or dates of the notes in their books, it will be of no avail for them to show that other bankers adopt the same mode of doing business, and that there is nothing unusual in it (*p*).

On the loss of a bank-note or bill payable to bearer, immediate notice of the loss should be given to the publick in the manner most likely to prevent persons who would be otherwise ignorant of the fact from taking it; but even if the lost note be not duly advertised, still, if a person receive it under circumstances reasonably calculated to induce a belief that he knew the holder to have possessed himself of it improperly, the loser is entitled to recover. If, after notice, a party take a note from a stranger, and abstain from making such inquiries as prudence and fair-dealing would suggest to a man of business, the owner may also in that case recover its value in an action against him who has so received it; for the negligence of the one is no excuse for the dishonesty of the other, though it might be for the mere negligence. The degree of caution necessary is merely that which is reasonably sufficient to satisfy the party taking the note that he who tenders it is not likely to have become possessed of it by fraud or theft. It will depend in all cases upon the value of the note, for it would be absurd to say that the like caution must be used in taking a 5*l.* note as in taking one for 500*l.* (*q*).

Where the plaintiff was robbed of bank-notes to a large amount at a publick meeting, and the loss was advertised, and handbills circulated, and two years afterwards one of the notes, being a note for 200*l.*, was paid into the Bank of England by a gentleman, who stated that he had received it from the defendant a few months previously, and the defendant, on being applied to, was unable to give any other account of the note than that he imagined he had received it in payment of a bet at the last Derby stakes, it was held that the plaintiff was entitled to recover the value of the note from the defendant (*r*).

Conversion of chattels by one of several partners, joint-tenants, or tenants-in-common of chattels.—The authorities seem to show that one partner or joint-tenant of a chattel cannot maintain an action against his co-tenant

(*p*) *Snow v. Leatham*, 2 C. & P. 317.

(*q*) *Best, C. J., Snow v. Peacock*, 11 Moore, 295; 3 Bing. 406. *Beckwith v.*

Corrall, ib. 337.

(*r*) *Easley v. Crockford*, 3 M. & Sc. 700; 10 Bing. 243.

for a conversion of the chattel, in consequence of his having taken upon himself to sell the subject-matter of the joint ownership by sale not in market overt, as the sale under such circumstances only transfers to the purchaser the vendor's interest in the chattel, and renders the purchaser co-tenant only with the other part-owners; but if the chattel be destroyed or sold in market overt, so as to transfer the entire property in the chattel to the purchaser, and oust the other part-owners of their proprietary rights, the sale would then amount to a conversion of the property, and the vendor would be answerable in damages to his other co-tenants (*s*).

In Littleton (sec. 323) it is said that, "if two be possessed of chattels personal in common, and one take the whole to himself out of the possession of the other, the other has no remedy but to take this from him who hath done the wrong, to occupy in common, &c., when he can see his time" (*t*). "This section of Littleton," observes Maule, J., "as it seems to me, is to be understood thus—that there may be dispositions of the subject-matter of the tenancy-in-common which will amount to a conversion, if done by a stranger, that are not so if done by a tenant-in-common. But I do not think that it therefore follows that no dealing with the thing by one of two tenants-in-common, that does not amount to a total annihilation of it, can be a conversion as against his co-tenant. It may be that the co-tenant may, if he think fit, follow the thing and make title to it, notwithstanding its sale and delivery to a third person. But it does not follow that where one tenant-in-common has dealt with the chattel to an extent exceeding his authority, as where he sells it out and out to a purchaser who carries it away, it would militate against a true understanding of the older authorities to hold that the co-tenant may treat that as a conversion" (*u*).

If one of two partners carries off the partnership property, and pledges it without the knowledge or assent of the other, this is not a conversion of the property by the pledgor, and does not render him liable to be sued by his co-partner, as he has a right to pledge to the extent of his limited interest, and to create a lien upon the partnership property (*x*). Where one of two partners became bankrupt, and the solvent partner directed the defendants to sell some partnership property in their hands, and the defendants sold it, and received the proceeds of the sale, it was held that the assignees of the bankrupt partner had no right to recover any of the proceeds of the sale from the defendant by action at law, but that they

(*s*) Cresswell, J., *Mayhew v. Herrick*, 7 C. B. 249. *Barnardiston v. Chapman*, cited 4 East, 121.

(*t*) Litt. sec. 323. *Holliday v. Cammell*, 1 T. R. 658.

(*u*) *Mayhew v. Herrick*, 7 C. B. 229.

(*x*) *Jones v. Brown*, 25 Law, J., Exch. 345. *Fennings v. Ld. Grenville*, 1 Taunt. 248.

must proceed for an account in the court of bankruptcy or in a court of equity (y).

Wherever the act done by the one tenant-in-common operates as a total destruction of the thing held in common, there is then a wrong done to the other tenant-in-common, in respect of which an action is maintainable. "If one of two tenants be of a dove-house, and the one destroy the old doves, whereby the flight is wholly lost, the other tenant-in-common shall have an action for a trespass" (z), "for there can be no tenancy in common of a thing destroyed" (a).

Conversion of chattels by parties who have a lien upon them.—If a defendant, having a lien upon goods (post, ch. 8) refuses to deliver them up on demand, and claims to retain them on grounds quite distinct from a claim of lien, his refusal will be evidence of a conversion, and the existence of the lien will be no answer to an action for the conversion of the property (b). But a person does not waive his right of lien merely by omitting to mention it when the goods are demanded; and if he claims a right to detain them, in respect of two separate sums claimed to be due to him, and he has a lien only in respect of one of those sums, his refusal is no evidence of a conversion, unless the sum in respect of which the lien exists is tendered (c). "Where a person," observes Alderson, B., "has no right of property in goods in his possession, but merely a right of lien, he has no right to sell them; and if he does sell the goods, he thereby puts an end to his lien" (d).

Where the plaintiff had agreed to buy of the defendant a stack of hay for 86*l.*, to be paid for when taken away, and to be removed by the 31st of May, and part only of the hay was paid for, and removed by the time appointed, whereupon the defendant, in the month of August following, cut up and consumed the residue of the hay, and the plaintiff afterwards tendered the unpaid purchase-money, and demanded the hay, and sued the defendant for converting it to his own use, it was held that the defendant's lien on the hay was determined by the act of conversion; that from the moment the defendant used the hay in a manner inconsistent with his claim of lien, his lien ceased, and a right of possession accrued to the purchaser (e). Where, however, some apples which had been sold by the defendant to the plaintiff at an agreed price, to be paid on a given day, were deposited in a kiln in an oast-house on

(y) *Morgan v. Marquis*, 9 Exch. 145.
Edwards v. Hooper, 11 M. & W. 363.

(z) Co. Litt. 200a, 200b.

(a) 14 Vin. Abr., 518, JOINT TENANTS.

(b) *Cannee v. Spanton*, 8 Sc. N. R. 714;
7 M. & Gr. 903. *Dirks v. Richards*, 5
Sc. N. R. 534; 4 M. & Gr. 574.

(c) *Scarfe v. Morgan*, 4 M. & W. 281.
Kerford v. Mondel, 28 Law, J., Exch.
303.

(d) *White v. Spettigue*, 13 M. & W.
608.

(e) *Gurr v. Outhbert*, 12 Law, J., Exch.
309.

the defendant's premises, and the key of the kiln was given by the defendant to the plaintiff, but the defendant kept the key of the outer door of the oast-house, and the day of payment being passed, the defendant gave the plaintiff notice to take and pay for the apples, and no attention being paid to this notice, the defendant carried them away and resold them, and the plaintiff then brought an action for conversion of them, it was held that the defendant was entitled to a verdict under a plea denying the plaintiff's right of possession of the apples (*f*).

SECTION II.

OF THE TITLE TO CHATTELS PERSONAL.

Title to things which have been altered or increased in value by a wrongdoer.—If one man takes away the chattel of another, either by design or accident, and alters it, or improves it, he has no right to detain it from the owner until his alterations and improvements have been paid for. If a man wrongfully takes away my carriage, and, without any authority from me, sends it to a coach-maker to be repaired or painted, I am entitled to the possession of my carriage without paying for the repairs or painting (*g*).

Where the defendant and the plaintiff, being at play, the plaintiff thrust his money into the defendant's heap, and so intermingled the coins that it became impossible to separate them, it was adjudged that the whole heap belonged to the defendant; and Coke, C. J., said, "The law is, that if J. T. have a heap of corn, and J. D. will intermingle his corn with the corn of J. T., the latter shall have all the corn, because this was done by J. D. of his own wrong" (*h*). And this case was put by Anderson: "If a goldsmith be melting of gold in a pot, and as he is melting it I will cast gold of mine into the pot, which is melted altogether with the other gold, I have no remedy for my gold, but have lost it; and if a man take my garment, and embroider it with silk or gold, or the like, I may take back my garment; but if I take the silk from you, and with this face or embroider my garment, you shall not take my garment

(*f*) *Milgate v. Kibble*, 3 Sc. N. R. 358;
3 M. & Gr. 100.

(*g*) *Hiscox v. Greenwood*, 4 Esp. 174.
(*h*) *Warde v. Eyre*, 2 Bulstr. 323.

for your silk which is in it, but are put o your action for taking of the silk from you" (i).

Title to chattels by finding.—The finder of a lost article is entitled to the possession of it as against all parties except the real owner. Where a chimney-sweeper's boy found a jewel, and carried it to a goldsmith's shop to know what it was worth, and delivered it into the hands of the goldsmith's apprentice, who, under the pretence of weighing it, took out the stone, and offered the boy three-halfpence for it, which the boy refused, and insisted upon having the jewel back, whereupon the apprentice delivered him the socket without the stone, and an action was brought against the master for a conversion of the jewel, it was ruled "that the finder of a chattel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner, and, consequently, may maintain an action for the conversion of it" (k).

Where the plaintiff, on leaving the defendant's shop, picked up a small parcel which was lying on the shop-floor, and showed it to the shopman, and the parcel, on being opened, was found to contain bank-notes, and the plaintiff requested the defendant to keep the notes, and deliver them to the owner, and the defendant advertised for the owner, and after the lapse of three years, no owner appearing to claim them, the plaintiff applied to the defendant for the notes, offering to pay the expenses of the advertisements, and to indemnify the defendant against any claim in respect of the notes, and the defendant refused to deliver them up, it was held that the plaintiff was entitled to recover them, or the value of them, and that the circumstance of the notes being found by the plaintiff inside the defendant's shop, in the defendant's own house, did not give the defendant any right to detain them as against the plaintiff, who found them there (l).

Of the title to wild birds and animals feræ naturæ—*Right of the hunter to the game he kills.*—The right at common law to animals *feræ naturæ* is very peculiar. So long as they remain upon a man's land they belong to him, but the moment they leave his land his possessory property is gone; and this is so, even if they be hunted out of his land by a trespasser, and although they be killed by the trespasser on another man's land. The continued pursuit gives the property in the animal to the trespasser, in exclusion of the person in whose land they are killed. The property in wild grouse is not absolute in any one. So long as the wild bird is upon a man's land he has a possessory property in it, but as soon as it

(i) Anon. Poph. 38.

(k) *Armory v. Delamirie*, 1 Str. 505.

(l) *Bridges v. Hawkenworth*, 21 Law, J., Q. B. 75.

fies or goes off his land, his property is gone (*m*). “If A starts a hare in the ground of B, and hunts it and kills it there, the property continues all the while in B; but if A starts a hare in the ground of B, and hunts it into the ground of C, and kills it there, the property is in A, the hunter, although he is liable to actions of trespass to the lands both of B and C” (*n*).

Where the Bishop of London granted to the defendant a lease of land for a term of years, excepting the trees, and the herons and shovellers making their nests in the trees, and the defendant, during the lease, took some of the herons, and the bishop brought an action of trespass against him, it was held that he was entitled to recover the value of the herons; for although they were *feræ naturæ*, he had an interest in them, by reason of the trees in which they built (*o*).

Title of the fisherman to the fish he harpoons or nets.—If a whale has been struck by a harpooner, the whale, so long as the harpoon remains in the fish, and the line continues attached to it, and also continues in the power or management of the striker, is a fast fish, though during that time it is struck by a harpooner of another ship; and if the whale afterwards breaks from the first harpoon, but continues fast to the second, the second harpoon is called a friendly harpoon, and the fish is the property of the first striker, and of him alone. But if the first harpoon or line breaks, or the line attached to the harpoon is not in the power of the striker, the fish is a loose fish, and will become the property of any other person who strikes and obtains it (*p*). But although the harpoon comes out of the fish, or is detached from the line, yet if the whale is so entangled in the rope as to give the first strikers the same power over it as if the harpoon was fixed, the fish will still continue a fast fish, and be the property of the first strikers (*q*); and if the fish is unlawfully liberated by the wrongful interference of a third party, who afterwards harpoons it and secures it, it will, nevertheless, be the property of the first strikers (*r*). But if the interference of such third party takes place before the fisherman has got the fish into his power, or under his dominion and control, there can be no right of property in, or title to, the fish. Thus, where the plaintiff, whilst fishing for pilchards, had nearly encompassed a vast quantity of fish with a net, and would have captured

(*m*) *Rigg v. Lonsdale*, 1 H. & N. 923, affirming *Lonsdale v. Rigg*, 11 Exch. 654; 25 Law, J., Exch. 81.

(*n*) *Ld. Holt, Sutton v. Moody*, 1 Ld. Raym. 250. *Churchward v. Studdy*, 14 East, 249.

(*o*) *Bishop of London's case*, 14 Hen. 8,

f. 1.

(*p*) *Littledale v. Scaith*, 1 Taunt. 243, note (a).

(*q*) *Hogarth v. Jackson*, 1 M. & M. 58.

(*r*) *Skinner v. Chapman*, 1 M. & M. 59n.

the whole of them but for the interference of the defendant, who came with boats and sailors, and drove the fish into his own nets and captured them, it was held that the plaintiff could set up no title to the fish, as he never had them under his dominion and control, but ought to have sued the defendant for interfering with his nets, and unjustifiably preventing the plaintiff from exercising his occupation and calling of a fisherman, and catching the fish (*s*).

Title to chattels by gift.—If a verbal gift has been made of a piece of plate, or other valuable chattel, to a person to whom it has been delivered to be kept, the verbal gift cannot, it has been held, transfer any property in the chattel to the donee. There must be either an actual manual delivery, if the chattel is capable of manual occupation and delivery, or a constructive delivery, if the article is bulky and incapable of manual transfer; or there must be a deed of gift under seal, in order to clothe the donee with the ownership and right of possession of the chattel (*t*).

Title to clothes by hiring and service.—Where the plaintiff had been hired as a servant by the defendant, at thirty guineas a-year and a suit of clothes, and had, on entering the service, been provided with the clothes, it was held that they did not become his property, and that he could not sue his master for detaining them until he had served a year (*u*).

Of the right to the possession of title-deeds, leases, bonds, and securities.—The owner of a freehold estate has, in general, a right to the title-deeds—the right to the deeds following the right to the land. Where, therefore, a mortgagor conveyed a freehold estate by way of mortgage to the plaintiff, and handed over to the plaintiff forged and counterfeit title-deeds, and then took the genuine deeds to a banker and obtained a loan of money, by depositing the deeds with the banker as security for the loan, and the plaintiff brought an action against the banker for the deeds, it was held that he was entitled to recover them (*x*). A lessee, to whom a lease has been delivered, has a right to the possession of the lease, both during the term and after its expiration, so that the lessor has no right to claim possession of it from the lessee (*y*). The obligee of a bond also, to whom the bond has been delivered, is not bound to deliver it up to the obligee on being tendered the amount due upon it. The obligor is entitled to an acquittance or an acknowledgment of the receipt of the

(*s*) *Young v. Hichens*, 6 Q. B. 606. The value of the fish diverted from one net to the other was 568*l*.

(*t*) *Irons v. Smallpiece*, 2 B. & Ald. 551. *Shower v. Pilck*, 4 Exch. 478; 19 Law, J., Exch. 113.

(*u*) *Crocker v. Molyneuz*, 3 C. & P. 470.

(*x*) *Newton v. Beck*, 3 H. & N. 220; 27 Law, J., Exch. 272.

(*y*) *Hall v. Ball*, 3 M. & Gr. 242.

money due upon the bond, but not to the possession of the instrument itself (z). Neither is the payee of a note not negotiable bound to deliver up possession of the note to the maker on receiving the amount due upon it (a).

Title to chattels by purchase in market overt.—At common law the right of property in things sold is changed permanently by a sale in market overt, so that whoever buys goods and chattels in the open, publick, legally constituted market, acquires an indefeasible title to the chattels so purchased, unless he buys with knowledge of an infirmity of title on the part of his vendor. But in order to put a check upon the transfer of stolen property, and induce parties who have been robbed to do their duty to society by prosecuting and convicting the thief, it was enacted by the statute 21 Hen. 8, c. 11, that if any felon do rob or take away any money, goods, or chattels from any of the king's subjects, and thereof be indicted, and arraigned, and found guilty, or otherwise attainted by reason of evidence given by the party robbed, or by the owner of the money, &c., or by any other, by their procurement, then the party shall be restored to his money, goods, and chattels, and the justices before whom the felon shall be found guilty, or otherwise attainted, shall have power to award from time to time writs of restitution for the stolen property. By this statute and the subsequent statute, 7 & 8 Geo. 4, c. 29, s. 57, to the same effect, the right of property in the things stolen is restored to the person robbed immediately on the conviction of the offender; and he is entitled to follow them and recover them from any person who may have purchased them *bonâ fide* in market overt, without notice of the robbery, and who has them in his hands or under his control at the time they are demanded by the person robbed. The order of restitution is in no wise necessary to revest the right of property in the party robbed, and enable him to follow goods sold in market overt (b).

During the interval between the commission of the felony and the conviction the purchaser has a *primâ facie* title, liable to be defeated by the conviction (c); and persons who purchase during that period, and have the good fortune to sell again before the conviction, cannot be subjected to an action for taking or converting the stolen property. Thus, where the plaintiff, who had been robbed of some sheep, and was prosecuting the thief, gave notice of the robbery to the defendant, who had purchased the sheep in market overt, not knowing them to have been stolen, and required the defendant to deliver up the sheep to him, which the defendant refused to do, and sold the sheep again before the conviction

(z) *Littledale, J.*, 10 Ad. & E. 618.

(a) *Wain v. Bailey*, ib. 616.

(b) *Scattergood v. Silvester*, 15 Q. B.

511; 19 Law J., Q. B. 447.

(c) *Peer v. Humphrey*, 2 Ad. & E.

495.

of the felon, it was held that the defendant was not responsible for a conversion. "The plaintiff," observes Buller, J., "could not demand the sheep of the defendant, merely because they had been stolen from him, for it was not then certain that the felony would be followed by a conviction of the offender." The plaintiff must prove that the sheep were his property, and that while they were so they came into the defendant's possession, who converted them to his use. But here the plaintiff's property did not revest in him till after the conviction of the felon; and from the time of the conviction the defendant has never had possession of the sheep (*d*).

Title to chattels by private sale and transfer.—A person who buys goods by private contract, and not by public sale in market overt, acquires no better title than that possessed by his immediate vendor. If he purchases at a sheriff's sale or a pawnbroker's auction property which the sheriff or the pawnbroker had no right to sell, he acquires no title as against the true owner of such property (*e*). An authority to a servant to sell in market overt is not to be construed as a continuing authority, so as to justify a sale by him elsewhere. Whenever, therefore, a purchaser buys of the servant or agent of the owner out of market overt, he takes the risk of the servant's having sold without authority; and if the servant had no authority to sell, and the purchaser refuses to give up the subject-matter of the sale on demand to the master, he is guilty of a conversion (*f*).

A purchase of stolen property out of market overt does not convey any right of property in the thing sold to the purchaser, although he may have purchased *bonâ fide* for a valuable consideration, and without notice of the felony. A person, therefore, who has been robbed may follow the stolen property, and is entitled to recover it from *bonâ fide* purchasers who have not bought it in the open public market, although the thief has not been convicted of the felony. In like manner, if the property has been pledged with a pawnbroker, or any other person, he may sue the pawnbroker, or other pledgee, for detaining or converting the property, although he has not prosecuted the thief nor taken any steps to put the criminal law in motion (*g*). But if the pawnbroker or pledgee received the goods knowing them to have been stolen, the owner of the property cannot then maintain an action against the latter until he has prosecuted for the felony.

(*d*) *Horwood v. Smith*, 2 T. R. 756.
Gimson v. Woodfull, 2 C. & P. 41.

(*e*) *Farrant v. —*, 3 Stark, 130.
Chapman v. Speller, 14 Q. B. 621; 19
 Law, J., Q. B. 239. *Morley v. Allen-*

borough, 3 Exch. 500.

(*f*) *Metcalfe v. Lumsden*, 1 C. & K.
 309.

(*g*) *White v. Speltigue*, 13 M. & W. 608.
Lee v. Bayes, 18 C. B. 599.

Whenever by a contract of sale, made either by the plaintiff in person, or through the medium of his agent, both the right of property and the right of possession of the thing sold has passed to the plaintiff, he is entitled to maintain an action for the unlawful taking, detaining, or converting of the thing which has thus become his own property. Where the plaintiff commissioned her brother to buy a cow for her when he should meet one which he thought would suit her, and the brother bought a cow, and as it was being driven home, and before the plaintiff knew of or had assented to the purchase, the cow was seized by a creditor of the brother, it was held that the plaintiff was entitled to maintain an action of trespass for the seizure of the cow, it being her property (*h*).

When specific ascertained chattels have been sold at a fixed price, the seller is bound to deliver them whenever they are demanded, upon payment of the price; but the buyer has no right to the possession of the chattels until he pays or tenders the price, unless the goods are sold upon credit (*i*). Where a debtor shipped goods on board a vessel at Newcastle, to be delivered to his creditor, the plaintiff, in London, and forwarded to the latter a receipt, signed by the mate, acknowledging the receipt of the goods on board, to be delivered to the plaintiff, it was held that the property and right of possession in the goods vested in the plaintiff so as to entitle him to maintain an action against a defendant for the non-delivery of the goods (*k*).

Title by fraudulent transfer—*Colourable transfers of property made for the purpose of perpetrating a fraud.*—If a transfer of property has been actually effected either by a deed of transfer or by actual delivery, it is not competent to either of the parties to the transfer to set up or show that it was done for the purpose of effecting a fraud on third persons. Acts done may be valid as between the parties, though void as to others. Thus, an assignment made for the purpose of defeating one of several creditors is a good deed as between the parties, but void as against creditors; but if there has been no actual transfer of the property, but only a deposit of chattels in the hands of a bailee, for the purpose of defeating a creditor, the depositary cannot set up the fraudulent character of the deposit in order to deprive the plaintiff of goods which are his property, and to which the depositary has no semblance of title (*l*).

Title to chattels by purchase from a person who has obtained possession of them by fraud and false pretences.—A contract for the sale of goods, though

(*h*) *Thomas v. Philips*, 7 C. & P. 573.
Payne v. Brander, 2 Stark. 568.

(*i*) *Bloxam v. Sanders*, 4 B. & C. 948.

(*k*) *Evans v. Nichol*, 4 Sc. N. R. 53; 3 M. & Gr. 614. As to transfer of chat-

tels by sale, see Addison on Contracts, ch. 4.

(*l*) *Bowes v. Foster*, 2 H. & N. 779; 27 Law, J., Exch. 262.

obtained by fraud, is perfectly good, if the party defrauded thinks fit to rely upon it and enforce it; but the latter may, if he pleases, as soon as he discovers the fraud, and before the rights of innocent third parties have intervened, disaffirm and annul the contract, and treat the party who has been guilty of the fraud as a tort-feasor. If a vendor has parted with the possession of goods in fulfilment of a contract of sale, obtained by fraud on the part of the purchaser, he cannot, after the goods have been resold, and passed into the hands of a *bond fide* sub-purchaser, disaffirm the contract, and annul the title of the latter to the property; for where one of two innocent parties must suffer, it is considered to be more just that the burthen should fall upon the vendor who parted with the possession of his goods, who trusted to a lie, and was the victim of his own credulity, rather than upon the *bond fide* sub-purchaser, who trusted to the actual possession of the goods by the party with whom he dealt. If this were not so, observes Jervis, C. J., "goods at all tainted by fraud might be followed through any number of *bond fide* purchasers—a most inconvenient and absurd doctrine; for a vendor who does not choose to avail himself of means of inquiry would thus, by trusting the vendee, be giving him unlimited means of defrauding the rest of the world" (m).

But if the relation of vendor and vendee does not subsist between the defendant and the person who commits the fraud, and the goods have been obtained by false pretences, and afterwards disposed of to a *bond fide* purchaser by sale not in market overt, the latter does not acquire a title to the goods as against the person who has been defrauded (n). Where, therefore, the plaintiffs had sold a quantity of tartaric acid, to be delivered to the order of their purchaser, and one Anderson came to the plaintiffs and represented himself to be a sub-purchaser of the acid, and upon the strength of such representation obtained a delivery-order from the plaintiffs, and got possession of the acid and pledged it with the defendants, it was held that the defendants could make no title to the acid through Anderson, who had obtained the transfer of the acid to himself without authority and by false pretences, and that mere possession of chattels, with no further indicia of title than a delivery-order, is not sufficient to entitle a *bond fide* pawnee of the person fraudulently obtaining possession from the true owner to resist the claim of the latter in an action for a conversion of the property (o).

Title to chattels in the hands of bailees.—If the owner of a chattel or a negotiable security places it in the hands of A, with directions to hand it over to B for B's use, that does not have the effect of transferring the

(m) *White v. Garden*, 10 C. B. 927. Exch. 342.

Sheppard v. Shoolbred, Car. & M. 63.

(n) *Higsons v. Burton*, 26 Law, J.,

(o) *Kingford v. Merry*, 1 Hurl. &

Norm. 503.

property to B. The direction remains countermandable by the remitter until it is executed either by the actual delivery of the chattel or money to the remittee, or by some binding engagement entered into between the agent and the remittee, which gives the latter a right of action against the former (*p*). "The transaction amounts to no more than a mandate from a principal to his agent, which can give no right or interest to a third person in the subject of the mandate. It may be revoked at any time before it is executed, or at least before any engagement is entered into with a third person to execute it for his benefit. And it will be revoked by any disposition of the property inconsistent with the execution of it" (*q*). But as soon as the party holding the chattel enters into a binding engagement with the third person to hold it for him, he cannot afterwards contest the title of the latter (*r*). If the defendant has led the plaintiff to believe that he would act as a warehouseman or bailee of the goods for the plaintiff, and after that parts with them to another, he will be guilty of a conversion (*s*).

Title by delivery-order.—The mere possession of a dock-warrant, delivery-order, or warehouse-keeper's or wharfinger's receipt for goods, or any other documentary evidence of title to chattels, is no stronger evidence of title and ownership than the actual possession of the goods themselves. And if by means of a delivery-order fraudulently obtained, and presented a warehouse-keeper, merchandise has been transferred in the warehouse-keeper's books of transfer into the name of the wrong-doer, the latter cannot thereby convey a valid title by sale or by pledge (*t*).

Title by purchase from the sheriff.—The ordinary course in cases of seizure of goods by a sheriff under a *fi. fa.*, is for the sheriff to sell by auction or by bill of sale; but the law does not require the sale to be made in any particular manner. If the sheriff has the goods valued, and then delivers them by way of sale to the execution creditor for the amount of the valuation, this is a good sale of the property to him (*u*). In ordinary cases of sales by sheriffs, there is no implied warranty of title on the part of the sheriff to the property he sells (*x*). In an interpleader suit between a claimant under a bill of sale from the sheriff and an execution creditor, proof of the bill of sale, with some evidence of a previous seizure of the chattels by the sheriff, is sufficient *prima facie* evidence of the title of the claimant (*y*).

(*p*) *Brind v. Hampshire*, 1 M. & W. 373. *Williams v. Everett*, 14 East, 596.

(*q*) *Scott v. Porcher*, 3 Mer. 663.

(*r*) *Stonard v. Dunkin*, 2 Campb. 314.

(*s*) *Hawkes v. Dunn*, 1 Cr. & J. 527.

(*t*) *Boyson v. Coles*, 6 M. & S. 14. *Kingsford v. Merry*, 1 H. & N. 503.

Godts v. Rose, 25 Law, J., C. P. 61.

(*u*) *Hernaman v. Bowker*, 11 Exch. 760.

(*x*) *Morley v. Attenborough*, ante, p. 199.

(*y*) *Hornidge v. Cooper*, 27 Law, J., Exch. 314.

Of the title to bills and notes.—Bank-notes are treated as money or cash in the ordinary course of business by the common consent of mankind. If, therefore, a man finds a bank-note, and pays it away *bond fide* in the ordinary course of business, the owner has no remedy for the recovery of the lost property; but if he demands the note whilst it still remains in the hands of the finder, the latter will be responsible for the non-delivery of it (z). In the case of the loss of a bill or note by theft or accident, if the bill or note be assignable by mere delivery, the thief or finder may confer a title by transferring it to a person who takes it *bond fide*, without any want of due care or caution, and who gives value for it without notice of any infirmity of title to the security at the time he receives it. But if the instrument is assignable only by indorsement, neither the thief nor the finder can make a valid indorsement (a).

Whenever a person discounts, or receives into his possession by way of deposit, a bill, or note, or negotiable security, knowing, or having reason to believe, that the person from whom he receives it is not the owner of it, he cannot lawfully detain it from the true owner (b); nor, if he has been guilty of gross negligence in taking the bill from a suspicious character, without making inquiry when he had means of inquiry, and of obtaining full information at hand, will he be entitled to keep the bill (c).

If a party discounts or cashes a bank-note, knowing that the person for whom he changes it has found it, he is in no better position than the finder, and cannot lawfully detain the note from the owner who has lost it. Where the plaintiff lost a 20*l.* Bank-of-England note, which was found by an old woman, who took it to the defendant to get it changed, saying that she had found it, and the defendant got the note changed and charged 2*l.* for his trouble, and the old woman, being called upon by the plaintiff for the note, gave up to him seven sovereigns, which was all she had left of the change, it was held that the plaintiff was entitled to recover the remaining 18*l.* from the defendant (d).

When a bill of exchange or a promissory note is transferable by indorsement, a transfer by indorsement confers no title to the bill on the part of the holder, if the indorsement is forged. If, therefore, a person has discounted such a bill on the credit of a forged indorsement, he will be guilty of a conversion if he appropriates the bill to his own use, or refuses to deliver the bill to the owner on demand (e).

(z) *Miller v. Race*, 1 Burr. 452; 1 Smith's L. C. 395. *Grant v. Vaughan*, 3 Burr. 1516.

(a) *Johnson v. Windle*, 3 Sc. 608; 3 Bing. N. S. 225. *Bayley on Bills*, 4th edit. p. 107.

(b) *Truettel v. Barandon*, 1 Moore, 546. *Lovell v. Martin*, 4 Taunt. 799.

(c) *Easley v. Crockford*, 10 Bing. 243. *Backhouse v. Harrison*, 5 B. & Ad. 1098. *Goodman v. Harvey*, 4 Ad. & E. 876; 1 Smith's L. C. 405-407.

(d) *Burn v. Morris*, 2 Cr. & M. 579.

(e) *Johnson v. Windle*, 3 Sc. 608; 3 Bing. N. C. 225.

Over-due bills and cheques.—If a bill, note, or cheque be taken after it is due, the party taking it can have no better title to it than the party from whom he takes it, and therefore cannot recover upon it, if it turns out that it has previously been lost or stolen. A cheque is intended for immediate payment, and not for circulation, and should be presented for payment on the day it is received or the day afterwards. A person, therefore, who takes a cheque a week after it bears date has no better title to it than the person from whom he took it. A cheque so taken is considered in the same light as a bill overdue (*f*).

Of the title of assignees of the chattels of bankrupts.—By ss. 141 & 142 of the Bankrupt Law Consolidation Act (12 & 13 Vict. c. 102), all the real estate (except copyhold), and all the personal estate and effects of a person who has been adjudged bankrupt, are absolutely vested in the assignees, by virtue of their appointment, without any deed of conveyance; but where, according to law, any conveyance or assignment of any real or personal property of a bankrupt would require to be registered, the certificate of the appointment of the assignees must (s. 142) be registered. Under the old bankrupt law, the title of the assignees to the chattels of the bankrupt had relation back to the act of bankruptcy, so that the chattels ceased to be his, and became the property of his assignees from the time of the commission of the act of bankruptcy, provided the petitioning creditor's debt then existed. But the very harsh effect of this doctrine has been beneficially modified by s. 133 of the Bankrupt Law Consolidation Act (12 & 13 Vict. c. 106), which enacts that all conveyances, contracts, dealings, and transactions, by and with any bankrupt *bonâ fide* made before the date of the fiat or filing the petition, shall be deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt provided the person dealing with the bankrupt had not at the time thereof notice of any prior act of bankruptcy (*g*). As against persons, therefore, having notice of the act of bankruptcy, and not being, consequently, within the protection of this clause, the title of the assignees will have relation back to the time of the act of bankruptcy (*h*), unless the fiat or adjudication of bankruptcy is obtained on the petition of the bankrupt himself, in which case there is no relation back to any act of bankruptcy prior to the fiat or adjudication (*i*), or unless the trader is adjudged bankrupt under s. 223 of the Bankrupt Law Consolidation Act (12 & 13 Vict. c. 106) without the filing of a petition by the creditor, in which case, also, the bankruptcy has no relation back to any act done by the bankrupt prior to the adjudication (*k*).

(*f*) *Down v. Halling*, 4 B. & C. 333.

(*g*) *Brewin v. Short*, 5 Ell. & Bl. 236.

(*h*) *Fawcett v. Fearn*, 6 Q. B. 28.

(*i*) *Stevenson v. Newnham*, 13 C. B.

301.

(*k*) *Monk v. Sharp*, 2 H. & N. 548; 27 Law, J., Exch. 20.

Of the title to chattels purchased from a bankrupt after an act of bankruptcy.—If a man buys goods of a bankrupt, and pays over the price to the latter with knowledge of the act of bankruptcy, he will have no title to the goods as against the assignees; but if he had no notice of the act of bankruptcy at the time he paid the money, the transaction will be protected by s. 133 of the statute. Assignees of bankrupts do not, by sending in a bill of parcels or invoice of goods purchased, necessarily ratify a dealing between the bankrupt and a defendant as a sale. It may amount only to a qualified offer on their parts to adopt the transaction as a sale, provided the defendant will pay for the goods, so as to leave it open to them to maintain an action for the conversion of the property if the defendant will not pay the money demanded (*l*). But if the assignees unreservedly adopt the transaction as a valid contract of sale, they cannot afterwards treat a refusal to re-deliver the goods as a conversion (*m*). By s. 134 of the Bankrupt Act, it is enacted that no purchase from any bankrupt *bona fide* made when the purchaser had notice of the bankruptcy, shall be impeached by reason thereof, unless a fiat or petition for adjudication shall have been issued or filed within twelve months after such act of bankruptcy (*n*).

Of the title of assignees of the chattels of insolvents.—The vesting order in cases of insolvency under 1 & 2 Vict. c. 110, transfers (s. 42) all the real and personal estate and effects of the insolvent prisoner to the provisional assignee for the time being of the estate and effects of insolvent debtors. After the making of the vesting order, the court may appoint assignees of the estate and effects of the insolvent prisoner, and when such assignees have signified to the court their acceptance of the appointment, all the estate and effects, rights and powers, of the insolvent vest in such assignees by virtue of their appointment (s. 45); but where any conveyance or assignment of property by the insolvent would require to be registered or recorded, a certified copy of the vesting order or appointment of assignees must be registered or recorded.

By s. 45 of this statute it is enacted, that if any prisoner, before or after his imprisonment, being in insolvent circumstances, voluntarily transfers any property, bills, bonds, notes, or securities, to any creditor, or to any person in trust, or for the benefit of any creditor, the transfer shall be void as against the assignees, if it has been made within three months of the commencement of the imprisonment, or with the view or intention of petitioning the court for a discharge from custody under the act (*o*). If, after the vesting order has been made, the prisoner is discharged from

(*l*) *Valpy v. Sanders*, 5 C. B. 803; 17 Law, J., C. P. 249.

(*m*) *Edwards v. Hooper*, 11 M. & W. 363.

(*n*) *Marshall v. Lamb*, 5 Q. B. 126.

(*o*) *Ogden v. Stone*, 11 M. & W. 494.

custody by the consent or default of his detaining creditor (s. 44), without any adjudication being made by the court, his estate and effects nevertheless continue vested in the assignee, for the benefit of those who may come in and show themselves entitled to a dividend (*p*). The only way in which the vesting order can be got rid of, so as to enable the petitioner to enforce the rights vested in him prior to his discharge, is, by another order revesting the estate in the insolvent, or by a dismissal of the petition (*q*). The after-acquired property does not vest in the assignees until they have got actual possession of it through judgment and execution against the insolvent. If no judgment is entered up, and the insolvent dies, or deals with his after-acquired property, the title of his personal representatives and assignees will prevail over that of the assignees in insolvency (*r*).

Of the title of assignees to the chattels of an insolvent petitioner.—On the presentation of any petition for protection under 5 & 6 Vict. c. 116, all the estate and effects of the petitioner forthwith become vested in the official assignee, nominated by the commissioners, acting in the matter of the petition (*s*). After the passing of the final order, the whole real and personal estate, present and future, of the insolvent petitioner, become vested (s. 7) in the official assignee, and assignee or assignees chosen by the creditors, who hold the same as fully as if the petitioner had been made bankrupt, and they had been assignees under the fiat. The after-acquired property of the insolvent becomes vested in the assignees upon their filing a copy of their claim upon the petitioner personally, or leaving it at his place of residence. The statute 7 & 8 Vict. c. 96, amending and adding to the provisions of the last-named act, enacts that the property of the insolvent petitioner shall vest in the assignees for the time being by virtue of their appointment (s. 4). But until an assignee has been chosen by the creditors, the official assignee, or his successor in office, is (s. 10) to be the sole assignee of the property and effects of such insolvent. If the petition of the insolvent is dismissed, all sales and dispositions of property duly made by any assignee, or any person acting under his authority, are to be valid, but all property of the petitioner not disposed of is to revest in him. By s. 19, it is enacted that if the petitioner shall, before or after the filing of his petition in contemplation of his becoming insolvent, or being in insolvent circumstances, voluntarily transfer any estate, real or personal, or security for money, to any creditor, or to any person liable as a surety for such petitioner, every such transfer shall be deemed fraudulent and void, as against the assignees, unless it is

(*p*) *Kernot v. Pittis*, 2 Ell. & Bl. 423; 23 Law, J., Q. B. 34.

(*q*) *Tudway v. Jones*, 24 Law, J., Ch. 508.

(*r*) *Holsgrove v. Hedges*, 24 Law, J.,

Ch. 456; 3 Drewry, 76. *Hawker v. Halliwell*, 23 ib. 778.

(*s*) *Sayer v. Dufaur*, 11 Q. B. 325; 17 Law, J., Q. B. 50.

made three months prior to the filing of the petition, and not with the view or intention of petitioning the court for protection.

Of the title of the trustee to the chattels of a debtor under statutory composition arrangements.—On the filing of a resolution and agreement of creditors to accept a composition or an arrangement under 7 & 8 Vict. c. 70, all the estate and effects of the petitioning debtor vest (s. 8) in the trustee, if any trustee has been appointed. If the creditors do not, by their resolution, appoint a trustee, and vest the estate and effects of the petitioning debtor in such trustee, there is no transfer of property, but the petitioning debtor still continues clothed with all his original legal rights (t). The Bankrupt Act, 12 & 13 Vict. c. 106, also contains various provisions for effecting arrangements between debtors and their creditors (ss. 211–231), and for vesting the estate and effects of the debtor by resolution of the creditors (s. 218) in the official assignee, either alone or jointly with another person (u).

Of the title to chattels of which a bankrupt was reputed or apparent owner at the time of his bankruptcy.—By s. 125 of the Bankrupt Law Consolidation Act (12 & 13 Vict. c. 106), it is enacted, that if any bankrupt, at the time he becomes bankrupt, shall, “by the consent and permission of the true owner thereof, have in his possession, order, or disposition, any goods or chattels whereof he was reputed owner, or whereof he had taken upon himself the sale, alteration, or disposition as owner,” the court shall have power to order the same to be sold and disposed of for the benefit of the creditors; but no transfer or assignment of any ship or vessel, or any share thereof, made as a security for any debt or debts, either by way of mortgage or assignment, duly registered, is to be invalidated or affected by reason of anything contained in the act (x). This section of the statute extends to chattels which were in the order and disposition of the bankrupt at the time of his committing any act of bankruptcy capable of supporting the adjudication, though such act be prior to the act on which the adjudication is founded (y). The order of the court for the sale is not final and conclusive against persons who have had no opportunity of being heard against it. “It would be a strange thing, and a monstrous hardship,” justly observes Maule, J., “that there should exist a power of depriving a man of his goods without giving him an opportunity of being heard” (z). The order must be specific as to the goods to which it is to

(t) *Chilcote v. Kemp*, 3 Exch. 514; 19 Law, J., Exch. 250.

(u) *Fisher v. Bell*, 12 C. B. 363.

(s) An unregistered bill of sale of a vessel will not transfer the property therein to the purchaser; and if the vendor becomes bankrupt before the purchaser has registered the bill of sale,

the assignees will be entitled to the vessel, as being the property of the bankrupt.—*Byson v. Gibson*, 4 C. B. 121; 16 Law, J., C. P. 147.

(y) *Stansfeld v. Cubitt*, 2 De G. & J. 222.

(z) *Graham v. Furber*, 14 C. B. 157; 23 Law, J., C. P. 10.

apply. A mere general order to sell and dispose of all property which the bankrupt may have had in his possession, as reputed owner, or of which he had the disposition, with the consent of the true owner, at the time of the act of bankruptcy, does not satisfy the requirements of the statute. "The object," observes Maule, J., "was to prevent the assignees from taking goods so circumstanced, unless they were in a situation to make it appear, before a competent jurisdiction, that there was a *prima facie* case for the seizure of the goods. To effectuate the object which the legislature had in view, I think the commissioners ought to have an opportunity (*ex parte*, indeed, as was rightly held by the lords justices) (a) to enter into some sort of examination before they authorize the assignees to seize and sell. If the assignees cannot, in the absence of opposition, make out a *prima facie* case before the commissioner, to justify the taking of the goods, they ought not to be allowed to contest the title of the true owner before a jury" (b).

Recovery of possession of the goods by the true owner before he had notice of the act of bankruptcy.—If, before the fiat, and without notice of an act of bankruptcy, the true owner has actually taken the goods out of the possession, order, and disposition of the bankrupt, his title will of course prevail over that of the assignees (c). If before the fiat, and after the act of bankruptcy, the owner has, *bonâ fide* and without notice of the act of bankruptcy, done anything which before an act of bankruptcy would have been sufficient to determine his permission and consent to the goods remaining in the possession, order, and disposition of the bankrupt, so as that a subsequent act of bankruptcy would not have subjected the goods to be dealt with under the clause respecting reputed ownership, his title will prevail, although he had not before notice succeeded in obtaining the actual possession of the goods. If, before the date of the fiat, and before notice of an act of bankruptcy, he has *bonâ fide* demanded the goods, and, communicating with the bankrupt, has done that which shows that the goods did not longer, with his consent and permission, remain in the possession, order, and disposition of the bankrupt, his title will not be defeated by a prior secret act of bankruptcy. But a mere intention to demand the goods, and to get possession of them, is not a "dealing" or "transaction" within the meaning of the statute (d). And if it appear that, at the time he got back his goods, he was cognizant of an act of bankruptcy having been committed by the bankrupt, the title of the assignees will

(a) *Ex parte Barlow*, 2 De G. M. & G. 921. J., Q. B. 90.

(c) *Graham v. Furber*, 14 C. B. 134.

(b) *Quatermaine v. Bittleston*, 13 C. B. 160; 23 Law, J., C. P. 109. *Freshney v. Carrick*, 1 H. & N. 661; 26 Law, J., Exch. 129. *Hornsbey v. Miller*, 28 Law,

(d) *Brewin v. Short*, 5 Ell. & Bl. 237. *Young v. Hope*, 2 Exch. 109. *Pariente v. Pennell*, 2 Mood. & Rob. 578.

prevail, and will relate back to the period of the commission of such act of bankruptcy (e).

Transfer of personal property and choses in action to assignees by reason of reputed ownership in cases of insolvency.—As regards insolvent prisoners and petitioners, it is enacted, that if any prisoner, at the time of his arrest, or the commencement of his imprisonment (1 & 2 Vict. c. 110, s. 57), or any petitioner for protection from process, at the time of filing his petition (7 & 8 Vict. c. 96, s. 17), shall, by the consent and permission of the true owner thereof, have in his possession, order, or disposition any goods or chattels whereof such prisoner or petitioner was reputed owner, or whereof he had taken upon him the sale, alteration, or disposition, as owner, the same shall be deemed to be the property of such prisoner or petitioner, so as to become vested in the provisional assignee, or the assignees, for the time being, of the estate and effects of such prisoner or petitioner; but no transfer or assignment of any ship or vessel, or share thereof, made as security for any debt by way of mortgage or assignment, duly registered, is to be invalidated or affected by reason of such possession, order, or disposition of the same.

What things are comprehended in these statutes under "goods and chattels."—These statutes extend only to chattels personal, and do not embrace chattels real, leases, or interest in land, or fixtures and things attached to the freehold. The object of the legislature was to prevent traders from gaining a delusive credit by a false appearance of substance, which may be caused by the possession of personal chattels, as the possession and ownership generally go together, which is not the case with regard to land and fixtures annexed to the realty (f). But moveable machinery in buildings, and all kinds of personal property, whether in possession or action, come within the description of "goods and chattels," such as bonds, bills of exchange and promissory notes, policies of insurance, shares in newspapers, and in public companies whose shares are made personal estate, stock in the public funds, patents for inventions, and charter parties (g).

What possession is within the statutes.—The possession of the goods and chattels by the bankrupt or insolvent must be a possession as reputed owner, with the consent of the real owner. A mere temporary custody, or the mere possession without reputation of ownership, or the possession with reputation of ownership, but against the will or without the know-

(e) *Fawcett v. Fearne*, 6 Q. B. 28. *Heslop v. Baker*, 8 Exch. 423; 20 Law, J., Exch. 350.

(f) *Horn v. Baker*, 9 East, 215; *Ex parte Barclay*, 25 Law, J., Bank. 4. *Lloyd*, 3 D. & C. 787. *Wilson*, 4 ib.

143. *Combs v. Beaumont*, 5 B. & Ad. 73. *Hubbard v. Bagshaw*, 4 Sim. 338. *Boydell v. M'Michael*, 1 C. M. & R. 177.

(g) *Hornblower v. Proud*, 2 B. & Ald. 327. *Longman v. Tripp*, 5 B. & P. 67.

ledge of the true owner, will not work a forfeiture of the property to the assignees (*h*). "There has been no case upon this act, or ever will be, wherein a court of law or equity will do so severe a thing as to subject the property of one man to the debts of another without proof of the consent of the real owner to leave them in the power of the bankrupt (possession only not being sufficient), or a laches in letting them remain there so as to get him a false credit" (*i*). Therefore the property of infants in the hands of traders, who deal with it as the reputed owners, cannot lawfully be sold for the benefit of creditors, by reason of the incapacity of infants to give their consent and permission within the intent and meaning of the statute (*k*). But if the real owner be of full age, and capable of acting for himself, it should be made notorious "to the world in which the bankrupt moves," that the latter holds the property adversely, and without the consent and permission of such owner (*l*), or the latter should have done all that can reasonably be expected of him to obtain possession of the property prior to the bankruptcy (*m*). If the goods have been placed in the possession of the bankrupt by a person who was himself only the bailee, the consent of the latter to the bankrupt's possession is not the consent of the true owner (*n*).

Reputation of ownership.—Where the bankrupt or insolvent has once been the actual and visible owner of goods and chattels, and has made over all his right and interest in them to a third party, either absolutely or by way of mortgage, and remains in possession of the things so transferred, the continuance of possession, if not a badge of fraud, raises an irresistible presumption of the continuance of ownership (*o*); so that if the goods are not taken out of the possession of the mortgagor before the mortgagee had notice of an act of bankruptcy (*p*), they may be disposed of for the benefit of the creditors. This is the case when a trader mortgages his furniture, goods and chattels, and stock-in-trade, and the mortgaged property is let to him by the mortgagee to be used for hire, or is allowed to remain in his hands notwithstanding the mortgage, and continues in his possession at the time of the issue of the fiat (*q*); where the goods and chattels of a trader are taken in execution by a creditor, and the latter receives an assignment of them from the

(*h*) *Ex parte Richardson*, Buck, 488.
Lingham v. Biggs, 1 B. & P. 88. *Oliver v. Bartlett*, 1 B. & B. 273.

(*i*) *Ld. Hardwicke, West v. Skip*, 1 Ves. sen. 243. *Parke, B., Belcher v. Helamy*, 17 Law, J., Exch. 222; 2 Exch. 310.

(*k*) *Ld. Eldon, Finer v. Cadell*, 3 Esp. 89.

(*l*) *Best, J.*, 2 B. & C. 398.

(*m*) *Smith v. Topping*, 5 B. & Ad. 674.

(*n*) *Fraser v. Swansea, &c.* 1 Ad. & E. 354.

(*o*) *Ex parte Castle*, 3 M. D. & D. 124.

(*p*) *Young v. Hope*, 2 Exch. 105.

(*q*) *Ryall v. Rowles*, 1 Ves. senr. 360.
Kirkley v. Hodgson, 1 B. & C. 598.
Freshney v. Carrick, 1 H. & N. 461.

sheriff, and allows the goods to remain in the trader's dwelling-house, and to be used by him for hire, down to the time of the issue of the fiat (r); where a person becomes a dormant or secret partner of a firm in partnership, and permits the partnership stock, furniture, and effects, to be in the possession and under the control of the ostensible partners, who become bankrupt (s); where a person, who is forbidden to trade in his own name, ships, and warehouses, and deals with goods in the name of the bankrupt, the latter not being a commission agent for sale, and the course of dealing not being according to the ordinary usage of trade (t); where a shareholder in a joint-stock company, or a railway company, mortgages his shares, or deposits the certificates of the shares with a creditor as a security for the repayment of money advanced, undertaking to execute a transfer of the shares when called upon, and the shares continue standing in his name in the books of the company, notwithstanding the assignment or deposit of the certificates, and no notice of the assignment has been given to the company" (u). But if it is the known custom of the company not to permit transfers to be made by parties registered as shareholders without the production of the certificates of the shares, and for shareholders to pledge or mortgage such certificates for the repayment of money advanced, and notice of the assignment has been given to the secretary of the company, or has been entered upon the books, so that parties dealing with the bankrupt might, on due inquiry, have ascertained the fact of the assignment, there will be no reputation of ownership, from the circumstance of the shares continuing to stand in the name of the bankrupt (x).

Where a sister advanced her brother 1800*l.* on the security of a deposit of mining shares belonging to the brother, and received the certificates of the shares, together with an undertaking, signed by the brother, to complete the transfer of the shares to the petitioner when required, and placed the certificates and the undertaking in an inclosure, which she sealed with her seal, and then deposited it in an iron safe belonging to her brother for greater security, it was held that the certificates were not in his possession, order, or disposition at all. He had, certainly, the custody of the packet, but could not lawfully have broken the seal to get at the contents (y). And if the change of owner-

(r) *Lingham v. Biggs*, 1 B. & P. 82.
Bryson v. Wylie, ib. 83, n. a. *Lingard v. Messiter*, 1 B. & C. 312.

(s) *Ex parte Enderby*, 2 B. & C. 389.
Ex parte Hare, 1 Deac. 16.

(t) *Gordon v. E. I. Co.*, 7 T. R. 228.

(u) *Ex parte Nutting*, 2 M. D. & D. 302. *Vallance*, 2 Deac. 354. *Lanc. Can. Co.*, 1 D. & C. 423. *Boulton, ex parte*, 20

Beav. 178.

(x) *Ex parte Harrison*, 3 Deac. 196.
Ex parte Masterman, 2 Mont. & Ayr. 212.
Langmead in re, 20 Beav. 25. *Littledale ex parte*, 6 De G. M. & G. 714; 24 Law J., Bank. 9. *Boulton in re*, 1 De G. & J. 179.

(y) *Ex parte Richardson*, 3 Deac. 503.

ship has been made notorious to "the world in which the bankrupt moves," the presumption of ownership from the continuance of possession will be rebutted (*x*)

Goods and furniture belonging to a woman who has passed herself off in the world as the wife of a bankrupt have been held to be in his possession, as reputed owner (*a*). But not goods in the possession of a bankrupt and his wife belonging to the trustees of his wife's marriage settlement (*b*); nor the goods of a son of a bankrupt, who lives in the same house with the bankrupt, although the goods have been used and dealt with by the latter (*c*). Wherever, upon a transfer by a trader before his bankruptcy, any reversionary interest accrues to his assignees, the immediate legal interest in the property transferred vests in them as trustees for the parties entitled in the first instance, and then for the creditors; and suits and actions in respect of the immediate interest must be brought in the names of the assignees (*d*).

Things sold by the bankrupt, and left in his possession after the sale — Raw materials in his hands for the purpose of being manufactured or worked upon.— If the bankrupt gets his living by buying and selling goods and chattels, and it is a known custom of trade for the vendor to keep possession after a sale of the things purchased, until the purchaser carts them away, or ships them off to their place of destination, possession under such circumstances will not raise a presumption of ownership; and if, after the sale, the bankrupt removes the articles away from the rest of his stock-in-trade, and puts them away in his cellars, warehouses, or into some private place of deposit, and there sets them apart for the purchaser, and enters the sale in his books, they are no longer, after such appropriation has been made, in the possession, order, or disposition of the bankrupt within the meaning of the statute, "for they are not then in the possession of the bankrupt under such circumstances as to deceive the creditors by the appearance of their forming part of that stock to which they might give credit" (*e*); but if the things are left upon the bankrupt's premises undistinguishable from his stock-in-trade, in order that they might be re-sold for the benefit of the buyer, they will be in the possession of the bankrupt as reputed owner, unless it be shown that the latter acts as a commission agent for the sale of goods, or it is a custom of trade for property to remain on the premises of the trader to be re-sold (*f*). "It is the usage," observes Parke, B., "of clock-makers to have clocks of other persons in

(*x*) *Muller v. Moss*, 1 M. & S. 335.

(*a*) *Mace v. Cammel*, Lofft, 782; Cowp. 232.

(*b*) *Simmons v. Edwards*, 16 M. & W. 888; 11 Jur. 592.

(*c*) *Davis v. Living*, 1 Holt, 275.

(*d*) *Leslie v. Guthrie*, 1 Bing. N. C. 710.

(*e*) *Ex parte Marrable*, 1 Gl. & Jam. 402. *Ex parte Dover*, 2 M. D. & D. 259.

(*f*) *Thackthwaite v. Cock*, 3 Taunt. 487. *Shaw v. Harvey*, 1 Ad. & E. 920.

their shops, both for repair and for sale, and a man has no right to infer, from finding a clock there, that it is the property of the clock-maker. No inference ought to be drawn either that it is or is not his, and, it being uncertain, there is no reputed ownership" (g).

If a ship-builder or manufacturer of steam-engines and machinery contracts for the building and sale of a specific vessel, or steam-engine, or mass of machinery, to be paid for by instalments as the work proceeds, and several instalments of the purchase-money are paid by the purchaser, so that the right of property in the chattel, so far as it has been completed, vests in the purchaser, and the builder or manufacturer becomes bankrupt, the unfinished chattel in his hands is not in his possession, order, or disposition, as the reputed owner, for it is the known custom of such trades for the manufacturer to be paid from time to time as the work progresses, and it is in general notorious that the builders and manufacturers of such articles are not themselves the owners of them, and the trade could never be carried on if such payments by purchasers were not protected (h). And with regard to property not capable of manual occupation and delivery, such as a ship building on the stocks, a haystack in a meadow, timber in a timber-yard, or oil, wine, or corn in stores and warehouses, the rule is, that if the bankrupt has sold such property *bond fide*, and received the purchase-money, and made such a delivery as the subject-matter of the sale is capable of, and placed the property at the disposal of the purchaser prior to the act of bankruptcy, it is not in the bankrupt's possession, order, or disposition within the statute, and does not pass to the assignees (i), although it has not been removed from the bankrupt's premises, provided it has remained there after the sale no longer than was reasonably necessary to enable the purchaser to fetch it away (k). But the transfer of the right of property must be complete. If the thing sold is in the hands of a third party, or if it is on board a vessel at sea, the bill of lading, delivery-order, or whatever documents of title may be necessary to establish the transfer of the ownership, must have been delivered to the purchaser prior to the issue of the fiat (l); and in the case of transfers and assignments of ships, the provisions of the registry acts must be complied with, and actual possession taken of the vessel on the first practicable opportunity.

Goods and chattels which have never been the property of the bankrupt.—

Where it is shown that the property in possession of the bankrupt at the

(g) *Hamilton v. Bell*, 10 Exch. 545;
24 Law, J., Exch. 46.

(h) *Woods v. Russell*, 5 B. & Ald. 942.

(i) *Manton v. Moore*, 7 T. R. 71.
Brown v. Heathcote, 1 Atk. 159.

(k) *Flyn v. Mathews*, 1 Atk. 185.
Parke, B., Belcher v. Bellamy, 17 Law,
J., Exch. 222.

(l) *Belcher v. Capper*, 4 M. & Gr. 551.
Lemprière v. Pasley, 2 T. R. 495.

time of the fiat never belonged to him at all, and was confided to him only for a temporary and special purpose, slighter circumstances will rebut a presumption of ownership arising from possession than in those cases where the property originally belonged to him, and has been subsequently sold and mortgaged without any change of possession (*m*). If goods and chattels have been sent pursuant to order, for the inspection and approval of an intended purchaser, and the latter becomes bankrupt with the goods in his hands before any contract of sale has been made, the goods so sent are not in his possession as reputed owner (*n*). Whenever the possession, taken in connexion with the custom and usage of trade, and the surrounding circumstances, "is consistent with the fact of a person being absolute owner, and also of his not being absolute owner, the mere possession ought not to raise an inference in the mind of any cautious person acquainted with the usage, that the person in possession is the owner" (*o*). Therefore, where there exists a custom which is known, that property standing in the name of a man in the books of a public company may only be his nominally, while the real right to it may be in another person, the reputation of ownership does not attach to the mere nominal possession. This is the case with money in the funds and shares in railway companies standing in the name of a party as trustee (*p*). Where it is the known custom and usage at a particular watering-place for houses to be taken ready furnished as well as unfurnished, and for carriages and horses to be let by the job, day, week, or month, the mere possession of furniture by the tenant of a house, or of a carriage and horses by an inhabitant, will of itself raise no presumption of ownership in the possessor (*q*).

Whenever the custom to hire as well as to buy the plant, machinery, and implements used in the trade which the bankrupt carried on is shown to be so general and notorious in the trade that those who had dealings with the bankrupt, "the world in which he moved might reasonably be provoked to inquire, before giving the bankrupt credit, whether he was the owner of them or not," there is no presumption of ownership from the possession of them. This is the case in the coal-mining trade, where it is the notorious custom of the owners of collieries to demise, not only the colliery, but also the steam-engines, plant, and machinery necessary to get out the coal; in the coal-lighterage trade, where it is the custom for the owners of barges and lighters used to discharge coals to let such lighters out to hire, and to suffer the names of the hirers to be printed upon them;

(*m*) *Ex parte Wiggins*, 2 D. & C. 270.

(*n*) *Gibson v. Bray*, 8 Taunt. 76; 1 Moore, 519. *Ashton in re*, 1 Foub. N. R. 258.

(*o*) *Abbott, C. J.*, 3 B. & C. 376; *Parke, B.*, 24 Law, J., Exch. 46.

(*p*) *Ex parte Watkins*, 4 D. & C. 87.

(*q*) *Burton v. Hughes*, 9 Moore, 334.

also in the brewing trade, where it is the notorious custom of brewers to hire their vats, barrels, coppers, and brewing utensils; and in the hosiery and lace trade, where it is the notorious custom for stocking-frames and masses of machinery to be let out to hire to the working hosiers, weavers, and mechanics. But the custom must be shown to be general and notorious in the trade, otherwise the presumption of ownership arising from the possession and use of such things will not be rebutted (r).

Possession by manufacturers, workmen, and depositaries.—Possession by manufacturers and workmen of goods and chattels, and of raw materials furnished to them by their employers to be manufactured, worked up, or repaired, in the way of their trade, raises no presumption of ownership within the statute. This has been held to be the case with the timber of the carpenter, delivered to him to be converted into waggons; the cloth of the tailor, sent to him for the purpose of being made into garments; the gold of the goldsmith, sent him to be worked up in the course of his trade; carriages sent to the coach-maker to be repaired, and machinery and chattels manufactured and made to order, and left on the manufacturer's premises after they have been paid for by the employer or purchaser, that they may be altered or repaired, or in order that the purchaser may send for them and convey them away (s). Possession by depositaries in the ordinary course of trade, where it is the custom for parties to let out vaults, stores, warehouses, and rooms for the purpose of receiving, storing, and taking care of pictures, furniture, or merchandize, for hire and reward, is not a possession by such depositaries as reputed owners of the goods intrusted to them for safe keeping. Goods and chattels, and contracts, holden by the bankrupt at the time of his bankruptcy as a security for the repayment of money advanced by him to the owners thereof, are not in the reputed ownership of the bankrupt, but the assignees are entitled to all the rights of the bankrupt over them. Goods deposited in the hands of the bankrupt for a specific purpose, or to be applied in a particular way in the ordinary course of trade, and holden by him no longer than is reasonably necessary to carry into effect the trust reposed in him, are not in his reputed ownership; nor bills, notes, and securities for money which have been deposited in the hands of a bankrupt or agent for a special purpose, and which have been set apart by him, and can be identified as the property of the depositor; nor a sum of money in a bag, purse, or box, deposited in the hands of a bailee for a special purpose, and set apart by the latter, and kept distinct from his own monies

(r) *Storer v. Hunter*, 3 B. & C. 368.
Watson v. Penche, 1 Sc. 149. *Horn v. Baker*, 9 East, 289. *Hornsby v. Miller*, 28 Lw. J., Q. B. 99.

(s) *Collins v. Forbes*, 3 T. R. 323. *Caruthers v. Payne*, 2 M. & P. 439. *Bartram v. Payne*, 3 C. & P. 177. *Wilkins v. Bromhead*, 7 Sc. N. R. 921.

and effects; but if the money is taken out of the bag or box and used by the bailee, and mixed with his own monies, it will form part of his general estate, and the amount will be a debt due from him to the bailor, which must be proved under the commission (t).

Possession, sale, and disposition of goods and chattels by factors and commission agents for sale in the ordinary course of their trade and business is not a possession, sale, &c. by them as reputed owners, although they sell their own goods as well as the goods of other persons, and all are confounded and mixed together, so that it is impossible to tell which goods belong to them and which belong to their customers. Persons selling goods on commission must have the goods of other people in their possession whilst carrying on their calling, and their possession is known not to be necessarily their own possession as owners. If it is the custom of shopkeepers in certain trades to receive the goods of third parties, and expose them for sale in their shops for a certain hire or commission paid by the owners of such goods, the things so received for sale, and the contracts made concerning them, are not, in case of their bankruptcy, in their possession as reputed owners. Booksellers and publishers, for example, who publish and sell books on commission for the authors and owners thereof, have not the reputed ownership of the books they sell, although the books are mixed with their own books, and are not to be distinguished from their general stock-in-trade (u); nor coach-makers, who receive and exhibit in their shops and warehouses coaches for sale (x); nor watch and clock-makers, who receive watches to be repaired and sold for their customers (y). But if it is not the custom for parties carrying on the trade exercised by the bankrupt to sell goods on commission, or if the whole stock-in-trade of a retail dealer is furnished to him by a wholesale house, and he trades therewith apparently on his own account, such stock-in-trade and goods will be in his possession, order, or disposition as reputed owner (z).

The fact of the bankrupt's having been intrusted with the goods as a commission agent for sale, may be proved by oral evidence, although the agreement for the deposit and sale of the goods has been put into writing (a). If the goods have been sold by the factor, and not paid for at the time of his bankruptcy, the owner or principal should give notice to the purchaser of the position in which he stands, and require the price

(t) *Parke v. Eliason*, 1 East, 551. *Thompson v. Giles*, 2 B. & C. 431. *Sadler v. Belcher*, 2 Mood. & Rob. 489. *Zinck v. Walker*, 2 W. Bl. 1154. *Jombart v. Woollett*, 2 Myl. & Cr. 389. *Sinclair v. Wilson*, 25 Law, T. R. 68. *Thoke v. Hollingsworth*, 5 T. R. 227. *Taylor v. Plumer*, 3 M. & S. 575.

(u) *Whitfield v. Brand*, 16 M. & W. 282. (x) *Carruthers v. Payne*, 2 M. & P. 441.

(y) *Hamilton v. Bell*, 10 Exch. 545. (z) *Livesay v. Hood*, 2 Campb. 83. *Shaw v. Harvey*, 1 Ad. & E. 920. (a) *Whitfield v. Brand*, 16 M. & W. 282.

to be paid to himself; and if, after such notice has been received, the purchaser pays over the money to the bankrupt, factor, or his assignees, the payment will be no answer to an action by the principal for the money. If, after the bankruptcy, the assignees receive the money, it may be recovered from them by the principal (b). If the factor has sold the goods and received a cheque on a banker, or a promissory note, or bill of exchange, by way of payment, which is ear-marked and can be identified, or has received money which he has put into a bag, box, or parcel, and set apart for his principal or employer, the cheque, bill, or note so received and the money thus set apart are not in his possession, order, or disposition as reputed owner; but if they have been mixed with the general monies of the bankrupt, they will form part of the bankrupt's estate, to be administered by the assignees, and the principal must then come in as a creditor upon the estate for the amount as a debt due to him from the bankrupt at the time of his bankruptcy (c).

Non-consent of the true owner.—We have already seen that if the owner has demanded back his goods prior to the act of bankruptcy, they are not in the possession of the bankrupt with his consent after the demand has been made. Goods obtained by fraud before the act of bankruptcy, and remaining in the bankrupt's possession at the time he becomes bankrupt, are not in the possession, order, and disposition of the latter with the consent of the owner. If, therefore, the bankrupt has obtained possession of goods through the medium of a fraudulent and pretended purchase, never intending to pay for them, and then becomes bankrupt, with the goods in his possession, they may be reclaimed by the vendor, as there is no true and apparent owner, in such a case, within the meaning of the statute, and no consent and permission by the former, the transaction being a cheat, and fraudulent altogether on the part of the buyer (d).

Possession by a bankrupt cestui que trust.—Possession by the bankrupt of furniture belonging to the trustees of his wife's ante-nuptial marriage settlement, is not a possession, by him, with the consent of the true owner, within the meaning of the statute (e); nor possession by the bankrupt's wife of cows and stock-in-trade, holden by trustees under a *bond fide* settlement for her separate use, unless the bankrupt has himself traded with the trust property, and got it into his own hands (f).

(b) *Ex parte Pauli*, 3 Deac. 169. *Murray*, Cooke's B. L. 379.

(c) *Ex parte Dumas*, 2 Ves., senr. 585; 1 Atk. 232. *Scott v. Surman*, Willes, 400. *Tooke v. Hollingworth*, 5 T. R. 227. *Godfrey v. Furzo*, 3 P. Wms. 185. *Whitecomb v. Jacob*, 1 Salk. 160.

(d) *Load v. Green*, 15 M. & W. 216.

(e) *Simmons v. Edwards*, 16 M. & W. 838.

(f) *Jarman v. Woollaton*, 3 T. R. 618. *Haselinton v. Gill*, ib. 620, n (a). *Ex parte Martin*, 19 Ves. 493.

Possession by bankrupt trustees.—Whenever goods and chattels and personal property are held by the bankrupt under the limitations of a will, or a marriage settlement, as a trustee for third parties, the possession of the bankrupt is not a possession with the consent and permission of the true owner within the meaning of the statute. This is the case with respect to possession by trustees of notes and securities held in trust (*g*), also of government stock and shares in the public funds, and joint-stock companies, &c., whether the trust does or does not appear upon the bank books, or the books or register of the company (*h*). Where the trust has not been created by a third party, but by the cestui que trust, or person beneficially interested himself, and the bankrupt has clothed the trustee with the apparent ownership of shares in a public company, by buying them in the name of the latter, and procuring him to be registered as a shareholder, and permitting him to have possession of the scrip certificates, and attend the meetings of the company, and vote as owner, there may be an apparent ownership with the consent of the true owner, within the mischief of the statute, for a delusive credit may be occasioned by a secret trust of that description (*i*). By 12 & 13 Vict. c. 106, s. 130, it is enacted, that if any bankrupt be possessed, as trustee, of any personal estate, government stock, funds, or annuities, or any of the stock of any public company, it shall be lawful for the Lord Chancellor, on the petition of the person entitled to the produce, dividends, or interest thereof, on due notice given to all persons interested, to order the assignees to assign such property to another trustee, to be holden upon the same trusts, &c. Property of testators and intestates, holden by executors and administrators, in the ordinary course of their administration, is holden by them as trustees, and cannot, consequently, be sold for the benefit of their creditors in case of their bankruptcy (*k*). But if they are allowed to continue in possession of the trust property for several years, and to trade with it, to all appearance, on their own account, by the parties who are entitled to dispute their possession, and call them to account, the property will be deemed to have been in the possession of such executors, &c., as reputed owners, with the consent of the true owners, within the mischief of the statutes (*l*).

A seizure by a sheriff, under an execution against a bankrupt, of the goods and chattels of a third party in the possession, order, and disposition of the bankrupt, with the consent of the true owner, does not in

(*g*) *Rogers ex parte*, 25 Law, J., Bank. 41. *Sinclair v. Wilson*, 20 Beav. 330; 24 Law, J., Ch. 537.

(*h*) *Ex parte Witham*, 1 M. D. & D. 624. *Pinkett v. Wright*, 2 Hare, 120.

(*i*) *Ex parte Burbridge*, 1 Deac. 142.

Ord, ib. 170.

(*k*) *Ld. Mansfield, Howard v. Jemmett*, 3 Burr. 1309. *Ludlow v. Browning*, 11 Mod. 139.

(*l*) *Fox v. Fisher*, 3 B. & Ald. 136. *Ex parte Thomas*, 3 M. D. & D. 49.

any way withdraw the goods from the possession, order, or disposition of the bankrupt, so as to interfere with the title of the assignees (m).

Of the right of property in things taken and converted after recovery of judgment in an action for the conversion of them.—The recovery of judgment by a plaintiff in an action for the wrongful taking and converting the plaintiff's goods and chattels has the effect of transferring the property of the goods converted from the plaintiff to the defendant. The plaintiff, by recovering damages for the wrong, loses his right of property in the chattel that has been converted, and this transfer of the right of property dates, by relation, back from the time of the conversion. The damages recovered by the plaintiff against the defendant are regarded as the price of the goods, "so that the defendant hath now the same property therein as the original plaintiff had, and this against all the world" (n). By damages recovered is not meant damages paid (o).

SECTION III.

OF ACTIONS FOR THE WRONGFUL CONVERSION OF CHATTELS.

Recapture and restitution of stolen property.—A person who has been robbed is entitled to retake the stolen property wherever he can find it, provided the person in possession of it has not acquired a title to it by purchase in market overt, without notice of the robbery. He is not justified in committing an assault, or a breach of the peace, in order to possess himself of the property, unless he finds it in the hands of the thief or the felonious receiver; but he must watch his opportunity for recovering possession, and if he is unable peaceably to retake it, he must pursue his remedy by writ of restitution, or by action. If there has been no alteration of the right of property in the thing stolen, by sale in market overt, he may at once demand it from the person in possession of it, and if the latter refuses to deliver it up to him, he may bring his action; but he cannot, as we have seen, sue the thief himself, or the felonious receiver, until he has done his duty to society by prosecuting the felon; for whenever a criminal, and, consequently, an injurious, act towards the publick has been committed, which is also a civil injury to a

(m) *Barrow v. Bell*, 5 Ell. & Bl. 540; Andr. 19; 6 M. & Gr. 640 n.
 25 Law, J., Q. B. 3. (o) *Buckland v. Johnson*, 15 C. B.
 (n) Per Cur. *Adams v. Broughton*, 163.

party, that party is not permitted to seek redress for the civil injury, to the prejudice of publick justice, and to waive the felony, and go for a trespass or conversion of his property, but he must first do his duty to the publick by prosecuting for the felony. If the right of property in the thing stolen has been divested from the party robbed, by a sale in market overt, the prosecution and conviction of the thief are then also, as we have already seen, a condition precedent to the existence of any right in the party robbed to recover back the stolen property. The party robbed is, by the statute 21 Hen. 8, c. 11, and 7 & 8 Geo. 4, c. 29, s. 57, to be restored to his right of property only on the thief's being indicted, arraigned, and found guilty.

The justices before whom the felon is found guilty have power to award, from time to time, writs of restitution for the recovery of the stolen property. It is discretionary in the court before whom the thief is convicted whether it will award a writ of restitution; but the order of restitution is in nowise necessary to revest the right of property in the party robbed, and enable him to maintain an action for the detention or conversion of the property (*p*).

The remedy, by way of action, for the recovery of the stolen property, or for damages for its detention or conversion, is confined, as we have seen, to those persons who had it in their possession at the time of the conviction of the thief or afterwards (*ante*, p. 198). Where a person loses, whether by accident or robbery, a negotiable security, he should, in order to entitle himself to recover it in action, be prepared to show that he has done all that could be required on his part to make known his loss, and that the party who has received it has, in doing so, failed to observe due caution (*q*).

Of the plaintiffs in actions for the conversion of chattels.—A party entitled to the temporary possession of chattels for a particular purpose may maintain an action for the conversion of such chattels against any person who takes possession of them, without having any colour of right so to do (*r*). He may be entitled to sue the owner, if he has a right as against the latter to the temporary possession of the chattel, and the owner refuses to deliver it up on demand (*s*). An auctioneer has a special property as bailee in goods and chattels which are put into his possession for the purpose of sale, whether such goods and chattels be in his own rooms, or in the house of another person; but this is not the case with regard to fixtures. An employment to sell fixtures only

(*p*) *Golightly v. Reynolds*, Loft. 88.
Scattergood v. Silvester, 15 Q. B. 511; 19
 Law, J., Q. B. 447.

(*q*) *Beckwith v. Corvall*, 11 Moore, 337;

3 Bing. 444; 2 C. & P. 261.

(*r*) *Burton v. Hughes*, 9 Moore, 339.
Sutton v. Buck, 2 Taunt. 307.

(*s*) *Roberts v. Wgyatt*, ib. 268.

authorizes him to sell the right of detaching and removing the fixtures; he has no possession of them as materials, unless it was intended that he should have possession of them after they were detached. Where, therefore, fixtures sold by an auctioneer were to be detached and removed by the purchaser, it was held that the auctioneer could not maintain an action for their wrongful removal (*t*).

If a timber-tree growing on land demised to a tenant is cut down, the property in the tree is in the lessor, and he may maintain an action against any person who carries it away (*u*); but the lessee has sufficient possession and special property in him to enable him to maintain an action for the conversion of the timber. Property in the hands of very young children is in the constructive possession of the father and master of the house; but watches and books given by a parent to a school-boy or apprentice, and taken away from home, are the property of the boy, and if they are taken away, detained, or converted by a wrong-doer, the boy, and not the parent, is the proper party to sue for the injury (*x*).

If the owner of chattels has, by contract, parted with the possession of them for a certain time, and has only a reversionary interest, he cannot sue a wrong-doer for converting the property (*y*), unless the bailee, or party clothed with the right of possession, has, by some wrongful act of his own, determined the bailment, or the privity of the bailment has been destroyed by the act of a wrong-doer in taking the goods out of the possession of the bailee, and selling them, or converting them to his own use (*z*).

Every hirer has the use, not the dominion, of chattels demised to him, and, therefore, when he alters or changes the nature of the property, or does anything to destroy its identity, his right of using it is at an end, the bailment is determined, and an action is maintainable for the wrongful conversion of the property (*a*). "If I lend to one my sheep to tathe his land, or my oxen to plough the land, and he killeth the cattle, I may well," observes Littleton, "have an action of trespass against him, notwithstanding the lending." "And the reason," saith Coke, "is, that when the bailee, having but a bare use of them, taketh upon him, as owner, to kill them, he loseth the benefit of the use of them" (*b*). If the hirer of chattels sends them to an auctioneer to be sold, this is a conversion of the goods to his own use, which at once determines the bailment, and the owner has an immediate right of possession, and may

(*t*) *Davis v. Dankes*, 3 Exch. 435.

(*u*) *Berry v. Heard*, Cro. Car. 242.

(*x*) *Hunter v. Westbrook*, 2 C. & P. 578.

(*y*) *Gordon v. Harper*, 7 T. R. 13.

Bradley v. Copley, 1 C. B. 698.

(*z*) See post, ch. 8. *Scott v. Newing-*

ton, 1 Mood. & Rob. 252.

(*a*) *Bryant v. Wardell*, 2 Exch. 482.

Holroyd, J., Farrant v. Thompson, 5 B. & Ald. 829. *Fenn v. Bittleston*, 7 Exch. 159.

(*b*) *Co. Litt.* 57a-57b.

at once sue for the recovery of the goods, or for damages for the loss of them (c).

If goods of the plaintiff have been let to hire to a tenant, and have been distrained for rent whilst in the possession of the latter, and impounded, the plaintiff, nevertheless, retains his right of property in the goods, whilst they continue in the custody of the law, and in case of pound breach against those who take and convert the goods (d).

Where the owner of a furnished house puts a party into the possession of the house to manage a business for him, at a certain agreed rate of remuneration, and gives him the use of the furniture, the occupier is the mere servant of the owner, his possession of the furniture is the possession of the master, and the latter is entitled to take it away at any time (e). A mere gratuitous bailment of a chattel to another (post, ch. 8) does not remove the chattel out of the possession of the bailor, and does not prevent the latter from suing a third party, who takes and converts the chattel, with or without the authority of the bailee. If goods are bailed by A to B, to be kept by the latter, and B bails them to C, who uses and wastes the goods, C is liable to an action at the suit of A for the recovery of compensation for the damage sustained (f). If the owner of a chattel gives a gratuitous permission to another to take the chattel and use it, he may, nevertheless, maintain an action against a stranger who takes, damages, or converts the chattel, whilst it is being used by the person to whom it has been lent (g).

Joinder of joint-owners as plaintiffs—Joint-tenants and tenants-in-common of chattels.—When several persons are joint-owners of a chattel, they must all be joined as plaintiffs in an action for the conversion of them (ante, pp. 10, 106, 184). Where some engravings had been mortgaged to the plaintiff, and the plaintiff and the mortgagor, after the execution of the mortgage, placed the engravings in the hands of the defendant in their joint names, to be sold by him by a public lottery or raffle, which failed for want of subscribers, and the mortgagor, being greatly in debt, absconded, and the plaintiff then demanded the engravings, but the defendant refused to deliver them to him alone, without an indemnity, it was held by Jervis, C. J., that the refusal was right, and that the plaintiff had no ground of action in respect thereof against the defendant (h). But it has been held that if one tenant-in-common of a

(c) *Loeschman v. Machin*, 2 Stark. 312.

(d) *Turner v. Ford*, 15 M. & W. 215.

(e) *Bertie v. Beaumont*, 16 East, 36.

Mayhew v. Suttle, 4 Ell. & Bl. 353.

(f) 12 Ed. 4, fol. 13, pl. 9; fol. 9, pl. 5.

(g) *Lotan v. Cross*, 2 Campb. 465.

Nicolls v. Bastard, 2 C. M. & R. 659.

Turner v. Ford, 15 M. & W. 212.

Manders v. Williams, 4 Exch. 343.

(h) *Burke v. Bryant*, C. B. Sittings after Trinity Term, 1852. And see post, ch. 8, s. 2.

personal indivisible chattel bring an action for a conversion against a stranger, if the stranger doth not plead the tenancy-in-common in abatement, he can have no benefit of it in evidence on the general issue (i), and the plaintiff will be entitled to recover damages in proportion to the extent and value of his interest, and the damage he has sustained (k).

Parties to be made defendants.—Every person who aids and assists in the act of conversion is responsible for the entire damage that has been sustained, although he acted only as the friend of another wrong-doer, the real principal in the transaction, or is merely a servant obeying his master's orders, and had no idea of committing any wrongful act himself. It is no answer that he acted under authority from another who had himself no authority in the matter (l). Every master and employer is, of course, responsible for a conversion, by his servant acting in obedience to his master's orders, or in the execution of his duty to his employer. Thus, if a ship-owner gives orders or directions to his ship-master to detain goods shipped on board, the ship-owner will be responsible for every thing done by the master whilst acting in obedience to his orders (m). And if a pawnbroker's servant, in the execution of his master's business, refuses to deliver up a pawn to the pawnor, on tender of the money due on it, the refusal of the servant is the refusal of the master, and the latter is responsible in damages for a conversion (n).

In order to recover against several persons for a joint-conversion, it must be proved that all concurred in some joint act of conversion. If the facts exclude a joint-conversion by all the defendants, but show separate acts of conversion in which some have participated and others not, some of the defendants may be found guilty and others may be acquitted, for several may be joined as defendants in an action for conversion, and one only may be found guilty (o). Where a ship-captain, intending to execute the duties of his employment *bond fide*, made a mistake in disposing of the cargo, which amounted to a conversion of it, it was held that there was a joint-conversion by the master and owner (p). If a married woman is guilty of a conversion of chattels, she and her husband may be joined as defendants (q). Where some sheriff's officers, being authorized to seize the goods of A, by mistake took the goods of the plaintiff, and lodged them in the defendant's stable, and when the plaintiff came and demanded the goods, the defendant's wife, in the

(i) *Ld. King, C. J. Barnardiston v. Chapman*, cited 6 T. R. 770.

(k) *Dockwray v. Dickenson*, Skin. 640. *Addison v. Overend*, 6 T. R. 770.

(l) *Parker v. Godin*, 2 Str. 813. *Stephens v. Elwall*, 4 M. & S. 261.

(m) *Schuster v. McKellar*, 7 El. &

Bl. 704, 26 Law, J., Q.B. 288.

(n) *Jones v. Hart*, 2 Salk. 441.

(o) *Nicoll v. Glennie*, 1 M. & S. 589. Ante, pp. 10, 65, 106–108; post, ch. 19.

(p) *Ewbank v. Nutting*, 7 C. B. 808.

(q) *Keyworth v. Hill*, 3 B. & Ald. 688.

defendant's absence, refused to give them up, saying, "I am told I shall be borne harmless," it was held that both the husband and wife were responsible for a conversion (r).

Of the staying of proceedings on the terms of the defendant's delivering up the chattels to the plaintiff and paying costs.—In actions for the conversion of goods and chattels, the defendant may, in certain cases, where no special damage is alleged, or, if alleged, where it is merely colourable, obtain an order for a stay of proceedings on the terms of the delivery of the goods to the plaintiff, and the payment of nominal damages and costs (s). In an action for the conversion of a packet of letters, the defendant was allowed to stay proceedings as to one of the letters, upon delivering it up to the plaintiff, and paying costs (t). But where there is any uncertainty, either as to the quantity, or quality, or value of the things which have been converted, or when damages have been sustained over and above the value of the goods, the court, or a judge, will not interfere to stay the proceedings upon the delivery of the goods to the plaintiff (u).

Declarations for a trespass, or for the conversion of chattels.—Whenever the goods and chattels of one man have been wrongfully taken and carried away by another, the wrong-doer may be sued either for a trespass or for a conversion of the chattels. If the chattels have come lawfully into the possession of the defendant, and there was no trespass in the taking of them, but the defendant fails to deliver them within a reasonable time after they have been demanded by a plaintiff entitled to the possession of them, the declaration should be for a conversion of them. A declaration for a trespass upon personal property alleges, either that the defendant seized and took certain goods and chattels of the plaintiff, and damaged and destroyed them, or deprived the plaintiff of the use of them, or that he shot at and lamed the plaintiff's dog, and greatly injured it, or that the defendant drove his horse and cart against the horse and carriage of the plaintiff, and greatly damaged them, and deprived the plaintiff of the use of them, and obliged him to hire another horse and carriage, &c., as the case may be, claiming damages in each case. A declaration for the wrongful conversion of the plaintiff's chattels by the defendant simply alleges "that the defendant converted to his own use, or wrongfully deprived the plaintiff of the use and possession of the plaintiff's goods," describing them (x).

(r) *Catterall v. Kenyon*, 3 Q. B. 810.

(s) *Chitty's Arch. Pr.* p. 1294, 9th edit.

(t) *Earle v. Holderness*, 4 Bing. 462.

(u) *Tucker v. Wright*, 11 Moore, 503.
Whitten v. Fuller, 2 W. Bl. 901. *Olivant*

v. Berino, 1 Wils. 28. *Gibson v. Humphrey*, 1 Cr. & M. 544. *Lucas v. Lond. Dock Co.*, 4 B. & Ad. 378.

(x) 15 & 16 Vict. c. 76, Sched. B. 28.
Holmes v. Hodgson, 8 Moore, 379.

Where a tenant of land, during his tenancy, and whilst removing a dung-heap, dug into and carried away a quantity of virgin-soil beneath the dung-heap, it was held that the soil, so soon as it had been severed from the freehold vested in the landlord as a chattel, so as to enable him to declare against his tenant for a trespass *de bonis asportatis*, or for a conversion of chattels (y).

What may be given in evidence under the plea of not guilty.—In actions for converting the plaintiff's goods, the plea of not guilty operates as a denial of the defendant's having committed the wrong alleged by taking or converting the goods mentioned, but not of the plaintiff's property therein, and no other defence than such denial is admissible under that plea (z). Wherever, therefore, the defendant allows that he meddled with goods which were the property, and in the possession of the plaintiff, he is presumed to be a trespasser, and if he has any matter of justification, or any authority, general or particular, express or implied, from the plaintiff, this must be specially pleaded. Therefore, where an action was brought against the defendant for unmooring the plaintiff's barge, it was held that the defendant could not, under the plea of not guilty, give in evidence facts and circumstances showing that he was justified in so doing; such as that the barge was in the greatest danger of being carried away by floating ice, and that the defendant, being employed generally by the plaintiff to look after his barges, removed the barge from a place of danger to a place of safety (a).

The plea of not guilty in actions for the conversion of chattels, puts in issue the wrongful character of the act, so that if the defendant detained them in the exercise of a legal right consistent with the fact of the right of property being in the plaintiff, the true character of the detainer and the existence of the right may be given in evidence under the plea of not guilty. The demand and refusal of the goods are not in themselves an actual conversion, but only evidence of it. Any fact, therefore, explanatory of the demand and refusal is receivable in evidence under the plea of not guilty, because it goes directly to show that there was no conversion at all: such as the fact that the defendant has a lien upon the chattel in his hands, or that he and the plaintiff were joint-owners of the chattel, and that what the defendant did was in the exercise of his legal rights as joint-owner with the plaintiff (b), or that the defendant had some qualified right in it, and has only dealt with the article in the manner in which he was entitled to deal with it in the

(y) *Higgon v. Mortimer*, 6 C. & P. 616; ante, pp. 122, 134, 157, 158, 161.

(z) Reg. Gen. Hil. Term, 16 Vict. 1

Ell. & Bl. App. lxxxi.

(a) *Milman v. Dolwell*, 2 Campb. 378.

(b) *Higgins v. Thomas*, 8 Q. B. 908.

exercise of his legal right (c). But a defence to the effect that the chattels had been given by the defendant to the plaintiff, subject to a condition not performed, whereupon they again became the property of the defendant, whereupon the latter retook them, and claimed to keep them as his own property, is not admissible under the plea of not guilty (d).

Of pleas denying the plaintiff's right of property in, or his right to, the possession of the chattel.—If the defendant intends to dispute the plaintiff's title to, or his right to the possession of the chattel taken or converted, he must plead a plea, alleging that the goods and chattels taken or converted were not at the time of the alleged conversion the property of the plaintiff, or that the plaintiff was not then entitled to the possession of them. Under this plea the defendant is at liberty to set up any circumstances showing that the plaintiff has no property in, or right of possession of the goods, in respect of which he is entitled to maintain the action against the defendant. A plea, denying that the goods are the goods of the plaintiff, puts in issue the plaintiff's property in, as well as his right to, the possession of the goods (e). If the defendant has, by contract, acquired a right to take and carry away the chattel, the contract may be given in evidence under a plea denying that the chattel was at the time of the seizure the chattel of the plaintiff (f). Under this plea it is competent to the defendant to show that the plaintiff had parted with the property before the cause of action arose, or that the defendant had a lien upon the goods, as a right of lien on the part of the defendant is inconsistent with a right of possession on the part of the plaintiff (g), or that the title to the goods had become vested in assignees under a bankruptcy (h), or by virtue of an order made by the Court of Bankruptcy, although the order was applied for, and made after action brought (i), or that the plaintiff's title has been defeated by matter subsequent to the bailment (k). In an action against assignees of a bankrupt for the conversion of chattels, the defence that the goods were at the time of the bankruptcy in the order and disposition of the bankrupt, with the consent of the true owner, and that the title to the

(c) *Young v. Cooper*, 6 Exch. 259; 20 Law, J., Exch. 136; Parke, B., 14 M. & W. 272, overruling *Stanciliffe v. Hardwick*, 2 C. M. & R. 1. *Wilkinson v. Whalley*, 5 M. & Gr. 500. *Ferrill v. Robinson*, 2 C. M. & R. 495.

(d) *Jones v. Davies*, 6 Exch. 663; ante, pp. 13, 68, 111.

(e) *Harrison v. Dixon*, 12 M. & W. 142.

(f) *Richards v. Symons*, 8 Q. B. 90.

(g) *Dorrington v. Carter*, 1 Exch. 566.

Lane v. Tewson, 12 Ad. & E. 116 n. *Bar-ton v. Brown*, 5 M. & W. 298. *Owen v. Knight*, 4 Bing. N. C. 54.

(h) *Leake v. Loveday*, 5 Sc. N. R. 921; 4 M. & Gr. 972. *Howarth v. Tollemache*, ib. 320.

(i) *Heslop v. Baker*, ante, p. 209.

(k) *Martin, B., Thorne v. Tilbury*, 3 H. & N. 539; 27 Law, J., Exch. 407; post, ch. 20.

goods vested in the assignees, by virtue of an order made by the Court of Bankruptcy, is admissible under a plea of not possessed, although the order was applied for and made after action brought (*l*).

Pleas of justification.—If the defendant intends to justify the taking of the goods on grounds distinct from any question of title or right of property or possession, he must set forth his ground of justification in a special plea; such as, that the goods and chattels mentioned in the declaration were wrongfully upon the defendant's land, encumbering the same, and doing damage there to the defendant, whereupon the defendant took the goods and carried them to the plaintiff's land, and deposited them there, doing no damage to them that could be reasonably avoided (*m*): or if the plaintiff complains of the shooting of his dog by the defendant, the latter may justify the trespass or conversion of the animal, on the ground that the dog was trespassing on the defendant's land in pursuit of and worrying the plaintiff's sheep, or hunting and chasing the defendant's deer, and that the defendant had no means of protecting his sheep or deer from injury but by shooting the dog, and that he therefore shot it (*n*).

Evidence at the trial — Proof by the plaintiff.—To enable a plaintiff to maintain an action and recover damages for a seizure or conversion of chattels, he must show that the seizure was wrongful, and that he has been damnified by it (*o*). He must, therefore, give some general evidence of his right to the chattel, and of the wrong done to him by the plaintiff in taking it away; for if there is no proof of his having ever been in possession of the chattel, or of his having any right to the possession of it, there is no proof of any wrong having been done to him, nor any evidence of any cause of action, nor anything to support the material averments of the plaintiff's declaration (*p*). Where the plaintiff proved that the defendant seized some chairs and tables in a house which was not the plaintiff's house, and carried them away, and the only plea on the record was a plea of not guilty, it was held that the plaintiff must, nevertheless, give some general evidence of his right to the possession of the chairs and tables to constitute a cause of action, and establish the tort or wrong charged in the declaration (*q*). If in a declaration for a trespass in entering a house and seizing goods there is no allegation that the goods belonged to the plaintiff, nor any admission to that effect on the record, there is no disclosure of any cause of action (*r*).

(*l*) *Heslop v. Baker*, 8 Exch. 411; 22 Law, J., Exch. 333. *Isaac v. Belcher*, 5 M. & W. 139.

(*m*) *Cole v. Maundy*, *Rea v. Sheward*, 2 M. & W. 426.

(*n*) *Barrington v. Turner*, 3 Lev. 28.

(*o*) *Tancred v. Allgood*, 4 H. & N. 438; 28 Law, J., Exch. 362.

(*p*) *Channon v. Patch*, 5 B. & C. 897.

(*q*) *Forman v. Dawes*, Car. & M. 129.

(*r*) *Pritchard v. Long*, 9 M. & W. 666.

Proof of conversion of chattels.—It is necessary for the plaintiff in an action for the conversion of chattels to prove either that the defendant unlawfully meddled with the plaintiff's goods, and removed them from some place where they had been deposited by the plaintiff, and that the goods had been since then lost to the plaintiff (ante, p. 184), or that the chattels came to the hands of the defendant wrongfully, or by a tortious taking (ante, pp. 185, 186), or that the defendant has unlawfully exercised dominion over them, to the prejudice of the plaintiff (ante, p. 184), or that there has been a wrongful destruction of the chattels (ante, p. 185). If the property came lawfully into the possession of the defendant, or under his dominion and control, there must then, as we have seen, be proof of a demand and refusal of the property by a party entitled to make the demand, and have possession of the chattels (ante, pp. 186–194).

The refusal must, as we have seen, be an absolute refusal, and not a qualified conditional refusal, amounting only to an objection to deliver the goods, until the plaintiff's title to them has been ascertained (ante, p. 188). If the plaintiff complains of the conversion of a bank-note or negotiable security, he must show that the defendant got the note under circumstances of suspicion, and prove the facts, which give him no right to hold the note as against the plaintiff (ante, pp. 190–192). Any admission on the part of the defendant that the plaintiff's property had come into the defendant's hands, or under his control, and had then been wrongfully dealt with by him, will be evidence of a conversion. Thus, where a defendant, in answer to a demand made upon him by the plaintiff for the delivery of a bill of exchange, said that he could not give it up because it had been burnt, it was held that this was evidence of a conversion by him of the bill (s).

Proof of chattels having been taken away from the plaintiff—Proof of constructive possession of chattels.—If a man cuts down wood or rushes, and stores them on the ground ready to be carried away, the things so severed from the realty are in the actual possession of the party who has cut them down, and proof that the act of severance has been committed by the plaintiff is sufficient *prima facie* evidence of title to enable the plaintiff to maintain an action against another person for seizing them and carrying them away, and the plaintiff's *prima facie* title cannot be disputed under the plea of not guilty (t). Proof that the plaintiff dug out ore, or sand and gravel, and piled it in heaps on the ground, is *prima facie* proof that he is entitled to the heaps (u). Proof that the plaintiff is the owner of a vessel taking in cargo is *prima facie* evidence that the

(s) *McKeown v. Cotching*, 27 Law, J., C. P. 41.

(t) *Rackham v. Jesup*, 3 Wils. 332.

(u) *Northam v. Bowden*, 11 Exch. 70; 24 Law, J., Exch. 238. *Rowe v. Brenton*, 8 B. & C. 737.

plaintiff is the owner of the cargo (*x*). If the plaintiff shows that he has a right to the possession of chattels, this will enable him to maintain an action for damages without proof that he has ever had actual possession of them, or that he is the owner of them; for a factor to whom goods have been consigned by the owner for sale, and who has never received them, may maintain an action for the conversion of them (*y*). There may be a constructive possession of chattels in respect of the right of property being actually vested in the plaintiff. Such is the case in an action of trespass by the lord for an estray or wreck taken by a stranger before seizure by the lord, where the right is in the lord, and a constructive possession, in respect of the thing being within the manor of which he is lord. So the executor has the right immediately on the death of the testator, and the right draws after it a constructive possession (*z*). If trees growing on land demised to a tenant are cut down by the latter, or fixtures attached to a dwelling-house are severed by the tenant, the landlord has an immediate right of possession of the trees and fixtures so severed from the inheritance; they are his goods and chattels, and if they are taken away from the demised premises he may maintain an action for the conversion of them (*a*).

Where there was an absolute assignment of goods by deed, with a covenant to pay a certain debt on demand, and a proviso for redemption on payment of the debt, and a further proviso that the assignor should continue in possession until default, and before any default made the goods were taken in execution and sold by the sheriff, it was held that the assignee had not such a right of immediate possession as would entitle him to maintain an action against the sheriff for a conversion of the goods (*b*).

Evidence for the defence.—The defendant cannot, as we have seen, set up any right or title to the subject-matter of the action in answer to a *prima facie* case on the part of the plaintiff, unless the right of possession or right of property has been put in issue by the pleadings (ante, pp. 225, 226); but he may, as we have seen, under the plea of not guilty, show that he has a lien on the goods, and detain them in the exercise of such right of lien, or that he is joint-owner of the goods with the plaintiff, or has some limited or temporary right or interest in them, and has therefore a right to keep them (ante, pp. 192–194). When goods have been taken from the actual possession of the plaintiff and the defendant fails in establishing

(*x*) *Brancher v. Molyneux*, 3 M. & Gr. 84.

(*y*) *Eyre, C. J., Fowler v. Down*, 1 B. & P. 47.

(*z*) *Smith v. Miles*, 1 T. R. 480.

(*a*) *Farrant v. Thompson*, 5 B. & Ald. 828.

(*b*) *Bradley v. Copley*, 1 C. B. 685.

any title in himself to the property, so as to justify the seizure, he will not be allowed to set up a *jus tertii*, and deny the plaintiff's title to the goods; for, as against a wrong-doer, possession is title, and the presumption of law is that the possession and ownership of chattels go together, and that presumption cannot be rebutted by evidence that the right of property was in a third person, offered as a defence by one who admits that he had no title and was a wrong-doer when he took or converted the goods (c). A wrong-doer, therefore, in actual possession of goods, the property of a stranger, can recover their value in an action of trover against another wrong-doer who takes the goods from him (d).

When the defendant is estopped from disputing the title of the plaintiff.— If the defendant has by deed admitted the title of the plaintiff to the chattels in respect of which the action is brought, he will be estopped from disputing it at the trial (e). If he has accredited the title of some third party to the goods, and so induced the plaintiff to buy from the latter, he will be estopped from setting up any title in himself (f). If the owner of goods parts with the possession of them, and knowingly suffers his bailee to deal with the goods as owner, and culpably and negligently stands by and allows a third party to acquire an interest in the goods on the faith and understanding of a fact which he can contradict, and does not contradict, he will be afterwards estopped from disputing the fact in an action against the person whom he has himself assisted in deceiving. Thus, if A, the owner of goods, stands by and permits B to sell them to C, without giving any notice to C of his being the owner of the goods, he will be estopped from disputing C's title under the sale (g).

Where the plaintiff, in order to protect his personal effects from his creditors, delivered the actual possession of them to the defendant, and in order that the latter might appear to be the true owner he made a priced invoice of the articles, and gave a receipt to the defendant for the amount as on a sale, it was nevertheless held that the plaintiff, as between himself and the defendant, was not estopped from showing the real character of the transaction, so as to entitle him to recover back the goods from the defendant. Here no deed of transfer had been executed, and the jury found there was no sale and no intention of transferring the right of property in the things to the defendant. "And," observes Martin, B. "it is perfectly true that if an act be done, the party cannot avail himself

(c) *Heath v. Milward*, 2 Sc. 160; 2 Bing. N. C. 100. *Carter v. Johnson*, 2 Mood. & Rob. 265. *Ashmore v. Hardy*, 7 C. & P. 505.

(d) *Jeffries v. Gl. West. Rail. Co.*, 5

Ell. & Bl. 806; 25 Law, J., Q. B. 107.

(e) *Wiles v. Woodward*, 5 Exch. 557.

(f) *Waller v. Drakeford*, 1 Ell. & Bl. 753.

(g) *Gregg v. Wells*, 10 Ad. & E. 98.

of his own fraud to undo it; but here the act is not done, as the jury expressly find there was no sale at all to the defendant," and no transfer whatever of the property in these goods to him (h).

Evidence under pleas of justification.—If the defendant has placed a plea of justification on the record, all the material averments of the plea should be proved. If the defendant justifies the shooting of a dog on the ground that the animal was hunting and chasing deer, and the defendant shot it to prevent the dog from continuing his sport, he is justified in so doing; but if the chasing is at an end, and the dog is making no attempt to recommence it, he cannot lawfully be shot (i). The same rule or principle of law applies to the shooting of dogs when in hot pursuit of conies in a rabbit-warren, sheep in a fold, and fowls in a poultry-yard (k). But if a man allows his sheep or his fowls to escape from his own land, and trespass upon his neighbour's property, and they are there attacked and worried by his neighbour's dog, he cannot justify the shooting of the dog in defence of his strayed sheep or fowls.

Dogs trespassing in pursuit of animals *feræ naturæ*, cannot lawfully be destroyed. "A dog," observes Lord Ellenborough, "does not incur the penalty of death for running after a hare in another man's ground. And if there be any precedent of that sort which outrages all reason and common sense, it is of no authority to govern other cases. A gamekeeper has no right to kill a dog for following game" (l), although the owner of the dog has received notice that trespassing dogs will be shot (m).

Of the assessment of damages.—Whenever the chattels of one man have been wrongfully seized by another who has assumed a virtual dominion over them, substantial damages are recoverable, although no pecuniary damage can be proved to have been sustained. Where, therefore, the defendant wrongfully seized the plaintiff's horse and cart, and placed a man to keep possession of it who allowed the plaintiff the free use of the cart, which was driven to market every day, it was held that the plaintiff was nevertheless entitled to recover substantial damages in respect of the infringement of his proprietary rights (n).

In actions for the conversion of chattels, the full value of the chattels at the time of the conversion is the measure of the damages, where no special damage is claimed, or has been sustained, and the goods have not been tendered and received back after action (o). If the chattel is of such

(h) *Bowes v. Forster*, 2 H. & N. 779; 27 Law, J., Exch. 202.

(i) *Barrington v. Turner*, 3 Lev. 28. *Protheroe v. Mathews*, 5 C. & P. 586.

(k) *Wadhurst v. Damme*, Cro. Jac. 45. *Wells v. Head*, 4 C. & P. 568. *Janson v. Brown*, 1 Campb. 41.

(l) *Vere v. Ld. Cawdor*, 11 East, 569.

(m) *Corner v. Champneys*, cited 2 Marsh, 584.

(n) *Bayliss v. Fisher*, 7 Bing. 163.

(o) *Wood v. Morewood*, 3 Q. B. 440 n. *Finch v. Blount*, 7 C. & P. 478. *Alsager v. Close*, 10 M. & W. 584. *Ewbank v. Nutting*, 7 C. B. 809.

a nature that the loss of it may readily be supplied by the purchase of a similar chattel in the market, the damage will be the marketable value of the chattel at the time of the conversion. If the value of it is doubtful, every presumption is made against the wrong-doer. Where a boy having found a jewel set in a socket took it to a jeweller's to know what it was worth, and the jeweller took the jewel out of the socket to examine it, and then refused to deliver it up, and the boy brought an action for the conversion of the jewel, "several of the trade were examined to prove what a jewel of the finest water that would fit the socket would be worth, and the Chief Justice directed the jury, that unless the defendant did produce the jewel, and show it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages, which they did" (p).

If a jury come to the conclusion that a defendant has come dishonestly by a part of property which has been stolen, they are warranted in finding that he got possession of the whole. Thus, where a diamond necklace worth 500*l.* had been stolen, and a portion of the diamonds shortly after the robbery came into the defendant's possession, and the latter gave contradictory and unsatisfactory accounts as to the mode in which he became possessed of them, and the owner sued and recovered a verdict for the full value of the necklace, it was held that the jury were justified in finding that the whole necklace came into the defendant's hands (q).

The plaintiff is entitled, under a declaration properly framed, to recover all that at the commencement of the suit he has lost through the wrongful seizure of his goods, and the defendant cannot, in mitigation of damages, show that after action brought he paid to the defendant the value of the goods (r). The jury are not limited in assessing the damages to the price or value of the article on the day of the conversion, but may give the value at any subsequent time at their discretion, as the plaintiff might have had a good opportunity of selling the goods if they had not been detained (s). If the defendant, acting *bonâ fide* under the belief that he had acquired the lawful ownership of the chattel, has proceeded to lay out money upon it, and improve it, and increase its value, the plaintiff will not in all cases be entitled to swell the damages by estimating them according to the improved value of the article. "It may be," observes Maule, J., "that the wrong-doer, who acquires no property in the thing he converts, acquires no lien for what he expends upon it, and the owner may bring an action for the detention or conversion of it; but it does not follow that the owner is to recover the full

(p) *Armory v. Delamirie*, 1 Str. 504.

(r) *Rundle v. Little*, 6 Q. B. 178.

(q) *Mortimer v. Craddock*, 12 Law, J., C. P. 166.

(s) *Greensing v. Wilkinson*, 1 C. & P. 626.

value of the thing in its improved state. The proper measure of damages is the amount of pecuniary loss the plaintiff has sustained by the conversion of the chattel, that is, what it was really worth at the time of the conversion" (t). If at the time of the seizure the plaintiff was under an obligation to have the goods sold, then, if they have been fairly sold, the price realized at the sale may be the fair measure of damages, if there has been nothing harsh or oppressive in the defendant's conduct, or that of his agents (u); but if at the time of the seizure the plaintiff was under no obligation to part with his goods, but was in a position to retain the dominion and use of them, he is at the very least entitled to be placed in the condition he was in at the time his goods were taken away from him, and to be compensated with such an amount of money as will enable him to replace the goods (x). "It is, however," observes Alderson, B., "entirely a question for the jury what damages they will allow. Juries have not much compassion for trespassers, and they are not bound to weigh in golden scales how much injury a party has sustained by a trespass" (y).

If the act of conversion amounts to pound breach, the party guilty of the wrong will be liable in damages to the landlord, and also to the owner of the property for damages for the conversion. "It might be difficult in such a case to ascertain the damages, but they would not exceed in the whole the value of the chattels distrained" (z).

Assessment of damages where the plaintiff is himself a bailee, or has only a limited or doubtful interest in the goods.—Where the plaintiff is not the actual owner, but is only a bailee or hirer, of goods which have been wrongfully taken out of his possession, he is entitled as against a stranger to recover the entire value of the goods; but if the action is brought by the hirer or bailee against the owner of the goods, the damages will be limited to the value of the plaintiff's interest in them (a). A defendant who has wrongfully deprived the plaintiff of the possession of goods cannot avail himself of the title of a third party in reduction of damages, but he may show that he was himself the owner of the goods at the time of the conversion, subject to some temporary or conditional right of possession on the part of the plaintiff, with a view of limiting the damages to the value of the plaintiff's limited interest (b). If a man brings an action for the conversion of a ship, and upon the evidence it appears that he has but the sixteenth part of it, this will go in

(t) *Reid v. Fairbanks*, 13 C. B. 729; 22 Law, J., C. P. 206.

(u) *Whitmore v. Black*, 13 M. & W. 509; 14 Law, J., Exch. 19.

(x) *Glasspool v. Young*, 9 B. & C. 696; 4 M. & R. 533.

(y) *Lockley v. Pye*, 8 M. & W. 135.

(z) *Turner v. Ford*, 15 M. & W. 215.

(a) *Heydon & Smith's case*, 13 Co. 68. *Waters v. Monarch*, 5 Ell. & Bl. 880; 25 Law, J., Q. B. 102.

(b) *Brierly v. Kendall*, 17 Q. B. 943.

reduction of damages, as he has no right to recover the value of the shares of the other part-owners (c). If it appears that the plaintiff has merely been clothed with the possession and ostensible ownership of the chattels, for the purpose of perpetrating a fraud or defeating a distress, or if he has made a transfer of the chattels which he has treated at one period as valid and *bond fide*, and at another as merely colourable, so as to leave it doubtful what is his real and *bond fide* interest in the property, the jury may, if they please, give him merely nominal damages (d).

Damages for the conversion of bills and notes are calculated, in general, according to the amount of principal and interest due upon the bills or notes at the time of the demand and refusal to deliver them up (e). But if a document, purporting to be a bill or note, has been lost or accidentally destroyed, and the defendant is unable to deliver it up, and can prove that it was not a genuine security, and was of no value at all at the time of the conversion, nominal damages only may be recoverable, if the plaintiff is entitled to recover damages at all (f). If the security has been mutilated and rendered valueless by the wrongful act of the defendant, the plaintiff will be entitled to recover what it would have been fairly worth to him had it continued a perfect and complete instrument (g).

Of the damages recoverable when the plaintiff has offered to return the goods, or the defendant has received them back after the commencement of the action.—If in the course of the cause the goods have been returned, the plaintiff is still entitled to proceed for further damages and his costs (h). When the goods have been returned and received unconditionally by the plaintiff, after the commencement of the action, and no special damage is alleged in the declaration, and the damage complained of is not necessarily incidental to the wrongful taking of the property, nominal damages only are recoverable. When substantial damages have been recovered, notwithstanding the return of the goods after the commencement of the action, there has been either an injury to the property converted, or the damage has been the actual and necessary consequence of the conversion; as in the case of the detention or conversion of a riding-horse, where the horse may have been deteriorated by ill usage, or where the plaintiff could not get back his horse without paying certain charges for his keep (i), the payment being a necessary consequence of the conversion. But the plaintiff, although he has taken upon himself to accept the goods

(c) *Dochowray v. Dickenson*, Skin. 640.

(d) *Cameron v. Wyuch*, 2 C. & K. 264.

Pringle v. Taylor, 2 Taunt. 150.

(e) *Mercer v. Jones*, 3 Campb. 477.

(f) *Mathew v. Sherwell*, 2 Taunt. 438.

Wills v. Wells, 8 ib. 267; 2 Moore, 254.

(g) *M^cLeod v. M^cGhie*, 2 Sc. N. R. 604.

(h) *Laughter v. Brefill*, 5 B. & Ald. 765; 1 D. & R. 417.

(i) *Syeds v. Hay*, 3 Burr. 1364.

without imposing any condition upon the defendant, has a right to go on with the action, and proceed to trial for the purpose of recovering his costs (*k*).

Damages, in the nature of interest, over and above the value of the goods.—

By the stat. 8 & 4 Wm. 4, c. 42, s. 29, it is enacted, that in all actions of trover or trespass *de bonis asportatis*, the jury, on the trial of any issue, or any inquisition of damages, may, if they think fit, give damages in the nature of interest, over and above the value of the goods at the time of the conversion or seizure thereof.

Special damages, far exceeding the value of the goods, are recoverable if specified and claimed in the declaration, and shown to be the natural and necessary consequence of the wrongful act. Thus, where the plaintiff complained, not only that the defendant took his goods, but that he did so under a false and unfounded claim of right, and that the plaintiff was thereby much annoyed and prejudiced in his business, and believed to be insolvent, and that by means of the premises certain lodgers were induced to believe that the plaintiff was in embarrassed circumstances, and that the defendant was entitled to seize the goods for a debt, and left the house, it was held that the jury might give vindictive damages for the injury, over and above the value of the goods seized (*l*).

Where a carpenter's tools have been detained or converted, and the carpenter, by reason thereof, has lost a valuable job, or been unable to earn his customary wages, damages far beyond the value of the tools may be recovered (*m*). So if, by reason of the unlawful detention of goods, the owner of them has been prevented from fulfilling a contract, or reaping the benefit of a bargain he had made, he is entitled to compensation for the special damage he has sustained, although performance of the contract or bargain could not have been enforced by compulsion of law (*n*). If in an action for the conversion of a horse the plaintiff claims damages in respect of his being obliged to hire other horses for his use, in consequence of his being deprived of his own horse, he will be entitled to recover the amount expended by him in horse-hire, in addition to the value of his own horse at the time of the conversion (*o*). A person who has wrongfully taken goods, and handed them over to a third party, is, under certain circumstances, bound to pay what it has cost the owner of the goods to get them out of the possession of the person into whose hands they have been wrongfully delivered (*p*).

Damages in actions for seizures under the Customs' Acts.— By 8 & 9

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| (<i>k</i>) <i>Moon v. Raphael</i> , 2 Bing. N. C. 314. | 22 Law, J., Exch. 186. <i>Wood v. Bell</i> , |
| (<i>l</i>) <i>Brewer v. Dew</i> , 11 M. & W. 629; | 25 ib. Q. B. 153. |
| post, ch. 21. | (<i>o</i>) <i>Davis v. Oswell</i> , 7 C. & P. 804. |
| (<i>m</i>) <i>Bodley v. Reynolds</i> , 8 Q. B. 779. | (<i>p</i>) <i>Keene v. Dilk</i> , 4 Exch. 388. <i>Pritchett</i> |
| (<i>n</i>) <i>Waters v. Towers</i> , 8 Exch. 401; | <i>v. Boovey</i> , 1 Cr. & M. 778. |

Vict. c. 87, s. 116, it is enacted, that if any action shall be commenced and brought to trial against any person on account of the seizure of any vessel, boat, goods, &c., as forfeited under any act relating to the customs, wherein a verdict shall be given against the defendant, if the court or judge before whom the suit has been tried shall have certified on the record that there was a probable cause for such seizure, then the plaintiff, besides the thing seized, or the value thereof, shall not be entitled to above twopence damages, nor to any costs of suit (g).

(g) And see further as to damages, post, ch. 21.

CHAPTER VII.

OF TRESPASSES AND INJURIES FROM THE NEGLIGENT USE AND
MANAGEMENT OF CHATTELS, AND THE NEGLIGENT
PERFORMANCE OF WORK.

SECTION I.—*Of trespasses and injuries from acts of negligence.*—Negligence and inevitable accident—Negligent management of chattels—Negligent driving and management of coaches, carriages, and railway trains—Secret defects in carriages—Identification of the passenger with the driver—Negligence of foot-passengers in publick thoroughfares—Negligent navigation of vessels—Negligence of masters and employers causing injury to their servants—Injuries to servants from the negligence of their fellow-servants—

Volunteers in dangerous employments—Injuries occasioned by the joint negligence of the plaintiff and defendant—Negligence on the part of skilled workmen and professional men—Negligence of attornies.

SECTION II.—*Of actions for negligence.*—Actions for compensating the families of persons killed by negligence—Parties to be made plaintiffs and defendants—Contractors and sub-contractors—Pleadings, defences, and evidence in actions for negligence—Damages recoverable.

SECTION I.

OF TRESPASSES AND INJURIES FROM THE NEGLIGENT USE AND
MANAGEMENT OF CHATTELS.

Negligence and inevitable accident.—No person may, as we have seen, be excused of a trespass except it be adjudged to have been committed entirely without fault, or to have been an inevitable accident, or to have been occasioned by the negligence of the plaintiff himself. "Looking into all the cases from the year-book in the 21 Hen. 7, down to the latest decision on the subject, I find the principle to be," observes Grose, J., "that if the injury be done by the act of the party himself at the time, or he be the immediate cause of it, though it happen accidentally or by misfortune, yet he is answerable" (r). Where to an action of trespass the defendant pleaded that he was a soldier of the trained bands, and was skirmishing

(r) *Leame v. Bray*, 3 East, 509.

with muskets charged with powder for exercise *in re militari*, and that in discharging his musket he accidentally and unintentionally injured the plaintiff, it was held that the plea, being a mere excuse, and no justification, afforded no answer to the action (*s*). So where the defendant was uncocking his gun, and the plaintiff was stopping to see it, and the gun went off and wounded the plaintiff, it was held that the plaintiff might maintain an action for the injury (*t*). So where the defendant entrusted a loaded gun to be carried by an inexperienced servant girl, and the girl pointed the gun in sport at the plaintiff, and drew the trigger, and shot him in the eye, and blinded him, it was held that the defendant was responsible in damages for the consequences of his carelessness (*u*). But if the injury has resulted from circumstances over which the defendant had no control, he is not then answerable. This has been held to be the case where the defendant's horse, being frightened by the sudden noise of a butcher's cart, which was driven furiously along the street, became ungovernable, and plunged the shaft of a gig into the breast of the plaintiff's horse (*v*); and where a horse, ridden by the defendant, was frightened by a clap of thunder, and ran away with him, and knocked down the plaintiff, who was incautiously standing with others in the carriage-road (*x*).

By the civil law, all the losses and damages which result from the act of another, whether through imprudence, rashness, ignorance, or other faults, are to be made good by him whose imprudence, or other fault, caused the mischief; for it is a wrong that he hath done, although he had no intention to do harm. Thus he who plays imprudently at a game in a place where there may be danger to others passing by is answerable for the harm he does (*y*). A waggoner, or a mule-driver, who hath not strength or skill enough to hold in a mettlesome horse, or an unruly mule, will be answerable for the damage caused thereby; for he ought not to have undertaken what he had not skill or strength enough to perform. If by overloading a horse or other beast, or by not avoiding a dangerous path, or by some other neglect, he causes damage to another, he will be answerable; and he who sustains the damage may have his action against the driver, or against the person who employed him (*z*).

Negligence of carriers of passengers for hire causing injury to their passengers.—Every carrier of passengers for hire, whether he be or be not a common carrier (post, ch. 9), is bound to exercise the greatest care and forethought for securing the safety of his passengers, and is answerable for the smallest negligence on his own part, or on the part of his servants

(*s*) *Weaver v. Ward*, Hob. 134. *Dickenson v. Watson*, 2 Jones, 205.

(*t*) *Underwood v. Hewson*, 1 Str. 596.

(*u*) *Dixon v. Bell*, 5 M. & S. 108.

(*v*) *Wakeman v. Robinson*, 1 Bing. 218;

8 Moore, 68.

(*z*) *Gibbons v. Pepper*, 1 Ld. Raym. 38.

(*y*) Domat. liv. 2, tit. 8, s. 4.

(*z*) Ib. liv. 2, tit. 8, s. 2, § 5.

and agents (a), but not for unforeseen accidents and misfortunes, which care and vigilance could not have provided against or prevented. He "does not warrant the absolute safety of his passengers. His undertaking as to them goes no further than this, that as far as human care and foresight can go, he will provide for their safety." "When everything has been done that human prudence can suggest, an accident may happen. The lights may in a dark night be obscured by fog; the horses frightened; or the coachman may be deceived by a sudden alteration in the position of objects near the road by which he had been used to be directed in former journeys; and if, having exerted proper skill and care, he from accident gets off the road, the proprietors are not answerable for what happens from his doing so." But the breaking down or overturning of a coach is *prima facie* proof of negligence on the part of the driver, and he must rebut this presumption, if it be unfounded, by showing that "the damage arose from what the law considers a mere accident" (b). When the carriage is by railway, the railway company is bound to keep the railway itself in good travelling order, and fit for use, and to provide roadworthy engines and carriages, skilful drivers and engineers, and all things necessary for the safe conveyance of such passengers. If the driver of a railway-engine drives at a dangerous speed, or from negligence or unskilfulness causes the train to be thrown off the rails, or to come into collision with another train, the railway company is responsible for all damages and injuries that may have been sustained by the passengers (c). But if a railway-train runs off the line in consequence of the wilful and malicious act of a stranger, who has placed a stone on the railway, then, as there is no negligence on the part of the railway company, they are not responsible for the consequences (d).

When the very occurrence of a railway accident is prima facie proof of negligence.—When both the railway itself, and the carriages in which the passengers are conveyed, are under the exclusive control of the company carrying the passengers, the very fact of a train's running off the line has been held to be *prima facie* proof of negligence on the part of such company, or its officers, and to throw upon them the burthen of explaining how it happened, and of showing that it occurred without any fault or neglect of duty on their part (e). If it appears that the train went off the rails when travelling at a moderate speed, and that the

(a) *Jackson v. Tollett*, 2 Stark. 38. *Dudley v. Smith*, 1 Campb. 169.

(b) *Crofts v. Waterhouse*, 11 Moore, 137; 3 Bing. 321. *Sharp v. Grey*, 2 M. & S. 620; 9 Bing. 400. *Harris v. Costar*, 1 C. & P. 637.

(c) *Collett v. Lond. & N. W. Rail. Co.*,

16 Q. B. 984. *Skinner v. Lond. Br. &c. Rail. Co.*, 5 Exch. 787.

(d) *Latch v. Rumner Rail. Co.*, 27 Law, J., Exch. 155.

(e) *Carpus v. Lond. & Br. Rail. Co.*, 5 Q. B. 751. *Latch v. Rumner Rail. Co.*, 27 Law, J., Exch. 155.

wheels of the carriages and engine were properly constructed, and the railway itself was properly made and in good order, and that the departure of the engine and carriages from the rails might have been occasioned by the malicious trespass of a stranger (*ante*, p. 239), there will be nothing to establish even a *prima facie* case of negligence against the company (*f*). But if the railway-bridges or viaducts have not been properly constructed, and secret defects exist, causing injuries to the passengers, the railway company will be responsible in damages, although they may have employed competent engineers and workmen, and have used the best materials in the work (*g*).

When a railway crosses a turnpike-road on a level adjoining to a station, the trains must slacken their speed before arriving at the turnpike-road, and cannot, unless there is some special provision to the contrary in the particular act under which the company is incorporated, cross the same at any greater rate of speed than four miles an hour (*h*).

Injuries from secret defects in carriages which ought to be kept in a road-worthy condition—Breaking of axle-trees.—A coach with a defective axle-tree is not roadworthy, and a coach-proprietor who sends out a coach with such a defect is responsible for the consequences, whether he does or does not know of the defect at the time the coach starts (*i*). A coach which is overloaded is not roadworthy, and if it upsets, in consequence of its being top-heavy, the coachman and coach-proprietor will be responsible in damages (*k*).

Collisions in public thoroughfares—Negligent management of horses and carriages—Negligent driving.—A person driving a carriage is not bound to keep on the regular side of the road; but if he does not, he must use more care, and keep a better look out, to avoid concussion, than would be necessary if he were on the proper part of the road (*l*). A foot-passenger is not bound to keep on the foot-pavement; he has a right to walk in the carriage-way, and is entitled to the exercise of reasonable care on the part of persons driving carriages along it (*m*). "It is the duty of persons who are driving over a crossing for foot-passengers to drive slowly, cautiously, and carefully; but it is also the duty of a foot-passenger to use due care and caution in going upon a crossing, so as not recklessly to get among the carriages" (*n*). If a person driving his own

(*f*) *Bird v. Gl. Northern Rail. Co.*, 28 Law, J., Exch. 3.

(*g*) *Grote v. Chester & Holyhead Rail. Co.*, 2 Exch. 255.

(*h*) 8 & 9 Vict. c. 20, s. 48.

(*i*) *Sharp v. Grey*, 9 Bing. 459; 2 M. & Sc. 623. Gaselee, J., observing that there was a material distinction between that case and the case of *Christie v.*

Griggs, 2 Campb. 79. *Grote v. Chester & Holyhead Rail. Co.*, 2 Exch. 255.

(*k*) *Israel v. Clark*, 4 Esp. 259. *Aston v. Heaven*, 2 Esp. 535.

(*l*) *Pluckwell v. Wilson*, 5 C. & P. 375.

(*m*) *Boss v. Litton*, ib. 407.

(*n*) *Pollock, C.B., Williams v. Richards*, 3 C. & K. 82.

carriage takes another person into it as a passenger, such person cannot be subjected to an action in case of any misconduct in the driving by the proprietor of the carriage, as he had no care nor concern with the carriage; but if two persons were jointly concerned in the carriage, as if both had hired it together, both will be answerable for any accident arising from the misconduct of either in the driving of the carriage while it was so in their joint care (o).

Liability of the master for the negligence of his servant.—If the master is himself driving his carriage, and from want of skill causes injury to a passer-by, he is, of course, responsible for that want of skill. If, instead of driving the carriage with his own hand, he employs his servant to drive it, the servant is but an instrument set in motion by the master. It was the master's will that the servant should drive, and whatever the servant does in order to give effect to his master's will may be treated by others as the act of the master. "*Qui facit per alium facit per se*" (p). But when a servant altogether loses sight of the object for which he is employed, and without having in view his master's orders, pursues his own wicked or malicious devices, to the injury of another, he cannot then be considered to be acting with his master's authority, or under his master's orders, in the proper course of his employment, and his master is not then responsible for his wrongful acts (ante, p. 159). Thus, it is said, "If I command my servant to distrain, and he ride on the distress, he shall be punished, and not I" (q); and "if my servant, without my knowledge, wrongfully takes my carriage, or my horse, for his own purposes, and drives against another person's carriage, I shall not be responsible for the injury; for when the servant takes the master's carriage or horse, and uses it under such circumstances, he gains a special property for the time being in the chattel, and makes it for the time, and for the particular wrongful purpose, his own (r). Where the defendant's coachman was driving the defendant's carriage through a narrow street, which was blocked up by a luggage-van, containing goods of the plaintiff, which were being unladen, and taken into the plaintiff's house, and behind the van stood the plaintiff's gig, and the defendant's coachman (there not being room for the carriage to pass) got off his box and laid hold of the van-horse's head, and moved the van, and caused a large packing-case to tumble on the shafts of the gig, and break them, it was held that the defendant was not liable for the injury, as he was not present, and the servant was not at the time executing his master's orders, or doing his master's work (s).

(o) *Davey v. Chamberlain*, 4 Esp. 229.
 (p) *Alderson, B., Hutchinson v. York, Newc. &c.*, 5 Exch. 350.
 (q) *Noy's Maxims*, Ch. 44.

(r) *M'Manus v. Crickett*, 1 East, 106;
 2 Roll. Abr. 553; ante, p. 159. *Sleath v. Wilson*, 9 C. & P. 607.
 (s) *Lamb v. Palk*, 9 C. & P. 631.

But whenever the master has intrusted the servant with the control of his carriage or horses, it is no answer that the servant disobeyed his master's orders, and went where he had no business to go. If the servant, driving his master's carriage, on his master's business, makes a détour to call on a friend, or to gratify some purpose of his own, and carelessly drives against another vehicle, the master will be answerable for the injury; but if the servant was going on a frolic of his own, without being at all on his master's business, then the master will not be liable (t).

Negligence of coachmen—Liabilities of owners of carriages let to hire who select and send their own coachmen.—If carriages and horses are let out to hire by the day, week, month, or job, and the driver is selected and appointed by the owner of the carriage, the latter is responsible for all injuries resulting from the negligent and careless driving of the vehicle, although the carriage may be in the possession and under the control of the hirer (u). But if the latter drives himself, or appoints the coachman and furnishes the horses, the owner of the carriage cannot of course be made responsible for the negligence or want of skill of the coachman (x). Two old ladies, being possessed of a carriage of their own, were furnished by a job-master with a pair of horses and a driver by the day, or drive. They gave the driver a gratuity for each day's drive, provided him with a livery-hat and coat, which were kept in their house, and after he had driven them constantly for three years, and was taking off his livery in their hall, the horses started off with their carriage, and inflicted an injury upon the plaintiff, and it was held that the defendants were not responsible, as the coachman was not their servant, but the servant of the job-master (y). But if any directions are given by the hirer of the horses to the driver or postillion to break through a line of carriages, or to do any unusual, improper, or aggressive act, or if he interferes so as to take the actual management of the horses into his own hands, he is responsible for any damage done by the driver whilst carrying out the directions given (z). "It is undoubtedly true," observes Parke, B., "that there may be special circumstances which may render the hirer of job-horses and servants responsible for the neglect of a servant, though not liable by virtue of the general relation of master and servant. He may become so by his own conduct, as by taking the actual management of the horses, or ordering the servant to drive in a particular manner, which occasions the damage complained of" (a).

(t) *Joel v. Morrison*, 6 C. & P. 503.
Mitchell v. Crassweller, 17 Jur. 717.

(u) *Laugher v. Pointer*, 5 B. & C. 572;
 8 D. & R. 556. *Smith v. Lawrence*, 2
 M. & R. 2. *Sammell v. Wright*, 5 Esp.
 262. *Dean v. Branthwaite*, ib. 36.

(x) *Croft v. Allison*, 4 B. & Ald. 590.

Hall v. Pickard, 3 Campb. 187.

(y) *Quarman v. Burnett*, 6 M. & W.
 507. *Laugher v. Pointer*, 5 B. & C. 547.

(z) *McLaughlin v. Pryor*, 4 Sc. N. R.
 665.

(a) *Quarman v. Burnett*, 6 M. & W.
 499.

The servant himself, by whose negligence or want of skill the accident has occurred, cannot defend himself against the claim of a third person by setting up that he was acting under the orders of his master, and that the act complained of was his master's act, and that the master alone is responsible (b).

Liabilities of borrowers of carriages for the negligence of their drivers.—

A person who has borrowed a horse and chaise for his own use and enjoyment, and who rides about in it, driven by a friend, whom he allows to drive, is responsible for the negligence of the driver, on a declaration charging that he was possessed of, and driving, the horse and chaise, and that the injury was occasioned by his negligent driving (c).

Injuries arising from the joint negligence of two drivers—Identification of the passenger with his driver.—When a collision between two carriages has been caused by negligent driving on both sides, neither party can recover damages from the other (post, p. 249); and it has been held that every passenger who has selected the particular conveyance by which he travels is so far identified with the driver or director of its movements that if any injury is sustained by him from collision with a rival vehicle, through the joint negligence of his own driver and that of the driver of the rival conveyance, precluding the former from maintaining an action against the latter, the passenger is himself equally precluded, and his only remedy is against his own driver, or the employer of the latter (d). But "it seems highly unreasonable that each set of passengers should, by a fiction, be identified with the coachman who drove them, so as to be restricted for remedy to actions against their own driver, or his employer. Why both the wrong-doers should not be considered liable to a person free from all blame, not answerable for the acts of either of them, and whom they have both injured, is a question which seems to deserve more consideration than it has received" (e). Where the drivers of two rival omnibuses were competing for passengers, the one endeavouring to get before the other, and both driving at great speed, and trying to avoid a cart which got in their way, and the wheel of the defendant's omnibus came in contact with the projecting step of the omnibus on which the plaintiff was riding, and caused it to swing against a lamp-post, and the plaintiff was thrown off and injured, it was held that he was not disentitled to recover damages from the proprietor of the rival omnibus, by reason of misconduct on the part of his own driver (f).

Negligence of servants in breaking-in and training horses—Liability of

(b) Alderson, B., 5 Exch. 350.

(c) *Wheatley v. Patrick*, 2 M. & W. 650.

(d) *Thorogood v. Bryan*, 8 C. B. 131.

(e) Note to *Ashby v. White*, 1 Smith's L. C. 220.

(f) *Rigby v. Hewitt*, 5 Exch. 240. *Greenland v. Chaplin*, ib. 247.

the master.—In an action on the case brought both against a master and his servant, the plaintiff set forth that the defendants brought a coach with two ungovernable horses into Lincoln's Inn Fields, where people were always going to and fro upon their business, and there, "improvidè et absque debitâ consideratione ineptitudinis loci," drove them to make them tractable and fit for a coach, and that the horses, being unmanageable, ran upon and injured the plaintiff; and it was urged that the master, being absent, the action was not maintainable against him, that no knowledge of the horses being unruly, nor any negligence was alleged, but judgment was given for the plaintiff (g).

Collisions in publick thoroughfares—Negligence of foot-passengers.—The degree of care to be exercised by foot-passengers in a publick thoroughfare to prevent collisions with others, depends in a great degree upon the injury that will be likely to result to others from their want of care. Thus a man who traverses a crowded thoroughfare with edged tools, or bars of iron, must take especial care that he does not cut or bruise others with the things he carries. Such a person would be bound to keep a better look-out than the man who merely carried an umbrella; and the person who carried an umbrella would be bound to take more care in walking with it than a person who had nothing at all in his hands.

Negligent navigation of vessels.—The Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104, part ix.), limits (s. 504) the liability of shipowners and owners of shares in sea-going ships to the value of the ship and freight in cases where, without any actual fault or privity on their parts, any loss of life or personal injury is caused to any person being carried in such ship; also, where any damage or loss is caused to any goods, merchandize, or other things whatsoever on board any such ship; also, where any loss of life or personal injury is, by reason of the improper navigation of such sea-going ship, caused to any person carried in any other ship or boat, or is caused to any other ship or boat, or to any goods, merchandize, or other things whatsoever on board any other ship or boat, the value of the ship and freight not to be taken to be less than 15*l.* per registered ton, in any case where there has been loss of life or personal injury to a passenger.

In respect of loss of life, personal injury, loss of, or damage to, goods, arising on distinct occasions, the owner is to be liable to the same extent as if no other loss, injury, or damage had arisen.

In case of loss of life, or personal injury, the Board of Trade may cause juries to be summoned to assess compensation (ss. 507, 508), of a very limited character. Provision is made (s. 510) for the application

and distribution of these damages to the parties entitled to them, and if they are dissatisfied with the amount they may, on procuring the amount thereof to be refunded, bring an action for the recovery of damages under various discouraging limitations and restrictions. Nothing, however, in the act is (s. 516) to lessen or take away any liability to which any master or seaman, being also owner, or part owner, of the ship to which he belongs, is subject in his capacity of master or seaman.

It has been held that the operation of this statute is confined to the ships of our own country, it being the plain and obvious rule in construing the enactments of any legislature, that the legislature of each independent country must be supposed to deal with those subject-matters which are within its own control and jurisdiction. Collisions, therefore, between British and foreign vessels, or between foreign vessels, are not within the restrictive clauses of this statute (*h*).

Non-observance of statutory or Admiralty regulations.—By the Merchant Shipping Act, 17 & 18 Vict. c. 104, s. 295, regulations are to be made by the Admiralty for the exhibition by steam-boats and sailing-vessels of lights at night in such places and under such circumstances as the Admiralty think fit, and certain rules are required (s. 296) to be observed by vessels passing each other; and it is enacted (s. 298) that if a collision between vessels appears to have been occasioned by the non-observance of the Admiralty or statutory rules, the owner of the vessel by which any rule has been infringed shall not be entitled to recover any recompense for any damage sustained by his vessel in the collision (*i*), unless it appears to the court that the circumstances justified a departure from the rule; and in case of damage to person or property from non-observance of any rule, the same shall be deemed (s. 299) to have been occasioned by the default of the master, or person having charge of the vessel, unless it appears to the court that the circumstances justified a departure from the rule.

The old rule of the Admiralty court, therefore, that in case of mutual blame, the damage shall be divided, has been superseded by the provisions of this statute (*k*).

Notwithstanding this statute, and the Admiralty regulations founded thereon, persons, in navigating their vessels, are still bound to keep a good look-out, just as they were before these regulations were made; and if it could clearly be made out that a vessel, having no light, had been run down by another vessel, from sheer carelessness and negligence in not keeping a good look-out, the owners of such vessel would have a right to

(*h*) *Cope v. Doherty*, 4 K. & J. 367; 27 *James*, 1 Swabey, 60.
Law, J., Ch. 600.

(*i*) *Dowell v. Gen. St. Nav. Co.*, 5 Ell. 162.
& Bl. 195; 26 Law, J., Q. B. 59. *The* (*k*) *Lawson v. Carr*, 10 Moore, P. C. C.

compensation from the wrongdoers (*l*). Although the damage resulting from a collision may be greatly increased by some neglect or default on the part of the plaintiff, yet if the plaintiff's neglect has not caused or contributed to the collision, he is not thereby precluded from recovering damages (*m*); but if the fault of the plaintiff himself is the proximate cause of the collision he cannot recover: if it is only remotely connected with the accident, then the question is, whether the defendant, by ordinary care, might have avoided the accident, and if he might, the plaintiff is entitled to recover (*n*).

A Queen's officer, stationed on board ship to do his duty there, together with others equally appointed, and stationed there by the same authority to do their several duties, is not responsible in damages for injuries occasioned by the negligence of his subordinate officers in carrying into effect the orders given by him in discharge of his public duty. Therefore, the captain of a sloop-of-war is not answerable for damage done by her in running down another vessel during the watch of the lieutenant who was upon the deck, and had the actual direction and management of the steering and navigating of the sloop at the time (*o*).

The mere fact of a ship being chartered and employed by the government as an armed vessel, and having a commander of the navy on board, under whose orders the vessel is navigated, will not exempt the ship-owners from responsibility for injuries occasioned by the negligence of a master and crew shipped on board, and paid by them (*p*). But no action is maintainable against the owners of a transport in the employ of government for damage done in the careful and proper execution of the orders of a government officer, under whose command the vessel was at the time of the accident, unless the order was only meant to apply to a particular state of circumstances, and to leave a certain discretion in the master of the transport, and the circumstances change, and the master carelessly and imprudently fails to direct his conduct in accordance with the altered circumstances and the requirements of good seamanship (*q*).

Negligence of masters and employers causing injury to their servants.—Every workman who engages in a dangerous employment takes it, as we have seen (*ante*, p. 93), with all its ordinary risks. The master is bound to provide for the safety of his servant in the course of his employment, to the best of his judgment (*r*); but the law does not impose upon the master the obligation of taking more care of the servant than he may be

(*l*) *Morrison v. Gen. Steam Nav. Co.*, 8 Exch. 738.

(*m*) *Greenland v. Chaplin*, 5 Exch. 247.

(*n*) *Tuff v. Warman*, 2 C. B., N. S. 740; 26 Law, J., C. P. 263. *The Vivid*, 1 Swabey, 88.

(*o*) *Nicholson v. Mouncey*, 15 East, 384.

(*p*) *Fletcher v. Braddick*, 2 N. R. 182. *Best, J., Scott v. Scott*, 2 Stark. 438.

(*q*) *Hodgkinson v. Fennie*, 2 C. B., N. S. 415; 26 Law, J., C. P. 219.

(*r*) *Paterson v. Wallace*, 1 Macq. 751.

reasonably expected to take of himself. The servant is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself; and in most of the cases in which danger may be incurred, he is just as likely to be acquainted with the probability and extent of it as the master. The master, therefore, is not responsible for injuries sustained by his servant through the viciousness of the horse which the servant is employed to groom, or through the breaking down of a van or carriage in which the servant is directed by the master to ride or drive, or from the employer's keeping an insufficient staff of servants for the performance of the work he has to do (s), or through the use of dangerous machinery, with the use of which the servant is, or professes to be, acquainted, and which he has voluntarily undertaken to use (t), or for the dangers attendant upon the mounting of scaffolds, which the workman has voluntarily undertaken to mount with as much knowledge of the attendant risk as the person who employs him (u).

Where the master's coach broke down through the negligence of a coachmaker who had contracted with the master to furnish the latter with sound roadworthy coaches, and repair them, and keep them in good working order, and the coachman was mutilated and maimed for life, it was held that he had no remedy for the injury. The law does not permit him to recover damages from his own master and employer. Neither can he sue the coachmaker whose negligence occasioned the injury. "It is no doubt a hardship upon the plaintiff," observes Rolfe, B. "to be without a remedy, but by that consideration we ought not to be influenced" (x).

The master is bound, as we have seen (ante, pp. 92, 93) to protect his servant from latent dangers on the master's premises, known to the latter and not known to the servant. If a man employs ignorant, inexperienced workmen in dangerous employments, and exposes them improperly to risks, of which he is cognizant, and which are not known to the ignorant workman, he will be liable for the consequences of his misconduct (y). And where rules are framed by employers for the purpose of regulating the management and exercise of a dangerous employment, and these rules are carelessly or improperly framed, so as to cause dangers and risks, which might be guarded against and prevented by proper rules carefully prepared, the employers will be responsible for the consequences of their negligence (z). Where statutory regulations exist for the management

(s) *Skipp v. East. Co. Rail. Co.*, 9 Exch. 223.

(t) *Dynen v. Leach*, 26 Law, J., Exch. 221.

(u) *Assop v. Yates*, 2 H. & N. 770; 27 Law, J., Exch. 166. *Griffiths v. Gidlow*, ib. 404.

(w) *Winterbottom v. Wright*, 10 M. & W. 115. *Priestley v. Fowler*, 3 M. & W. 6.

(y) *Bartonshill Coal Co. v. Reid*, 8 Macq. 296.

(z) *Foss v. Lanc. & York Rail. Co.*, ante, p. 93.

of a colliery, and securing the safety of the workmen, and these rules are culpably neglected with the knowledge of the owner of the mine, the latter will be responsible for the consequences of his neglect of duty, unless the party injured has brought the mischief upon himself by his own negligence (a).

Injuries to one fellow-servant from the negligence of another fellow-servant in the same employment.—Where several servants are employed by the same master in one common employment, the master is not responsible for injury resulting to one of them from the negligence of another, provided the master has taken due care not to expose his servant to unreasonable risks (b), and has been guilty of no want of care in the selection of proper servants (c). The principle laid down is, that a servant, when he engages to serve a master, undertakes, as between him and his master, to run all the ordinary risk of the service; and this includes the risk of negligence on the part of a fellow-servant whenever he is acting in discharge of his duty as servant of him who is the common master of both. Thus it has been held that a railway company is not responsible for an injury occasioned to one of their own servants by a collision on their railway, caused by the negligence of another of their servants, in respect of which injury they would undoubtedly have been liable if the party injured had been a stranger travelling as a passenger for hire. But the servants must be fellow-servants, engaged in a common service. It is not enough that the servant injured, and the servant causing the injury, should be servants of the same master; they must be employed in the same work: for if a gentleman's coachman was to drive over his gamekeeper, the master would be just as responsible as if the coachman had driven over a stranger (d). A sub-contractor and his servants engaged in doing the common work of a particular contract, under a contractor, are all fellow-servants, engaged in one common employment, though each directs and limits his attention to particular branches of the work, and they all are held to undertake, as between themselves and the contractor, to run all the ordinary known risks of the service, including the risk of negligence of the other servants engaged in discharging the work of their common employer (e).

Injuries to volunteers who come forward to assist gratuitously in work of a dangerous nature.—If a person comes forward as a volunteer, and offers to assist servants engaged in a difficult or dangerous work, and the volunteer gets injured through the negligence of one of the servants, the employer

(a) *Senior v. Ward*, 28 Law, J., Q. B. 139; and see ante, pp. 92-96.

(b) *Hutchinson v. York, &c. Rail. Co.*, 5 Exch. 358. *Wiggett v. Fox*, 11 Exch. 887; 25 Law, J., Exch. 188.

(c) *Tarrant v. Webb*, 18 C. B. 805.

(d) *Ld. Cranworth, Bartonshill Coal Co. v. Reid*, 3 Macq. 294, 307.

(e) *Wiggett v. Fox*, 11 Exch. 882; 25 Law, J., Exch. 188.

is not responsible for the injury; for a person, by volunteering his services, cannot have any greater rights, or impose any greater duties on the employer, than would have existed if he had been a hired servant (f).

Effect of the injury having been occasioned by the negligence or default of the plaintiff himself, as well as by the negligence of the defendant.—A plaintiff cannot recover damages if, but for his own negligence, or that of the person who represents him, the accident would not have happened, though there was negligence on the part of the defendant (g), for the plaintiff cannot complain of an injury which his own negligence and want of care has contributed to bring upon him (h). “If,” observes Domat, “any one goes across a publick cricket-ground whilst people are playing there, and the ball, being struck, chances to hurt him, the injury is to be imputed to the imprudence of the person who sought out the danger, and not to the innocent striker of the ball” (i). Where the plaintiff and defendant, being jointly interested in the pulling down and rebuilding of a party-wall between their respective houses, each appointed an agent to superintend the execution of the work, and the work was negligently done, and the plaintiff’s house was much injured from the want of proper support during the execution of the work, it was held that he could not maintain an action for damages against the defendant, as the blame was the common blame of both. “Since the wall,” observes Lord Ellenborough, “was taken down by both, neither could impute negligence to the other” (k). If an obstruction has been negligently placed in a publick thoroughfare by the defendant, and the plaintiff has ridden against it, he cannot recover damages from the defendant if it appears that he was riding at an improper pace, or was intoxicated, and could have avoided the obstruction if he had ridden with reasonable and ordinary care (l). If the risk is obvious, the plaintiff ought not to incur it (m), but should proceed to remove the obstruction (ante, p. 101), or take legal proceedings for its removal, and for the recovery of the damages he has sustained by being deprived of the use of the thoroughfare.

If a rule established for securing the safety of workmen in a dangerous employment is habitually violated, to the knowledge of the workman himself, the latter has no ground to recover damages from

(f) *Degg v. Mid. Rail. Co.*, 1 H. & N. 778; 26 Law, J., Exch. 173.

(g) *Waite v. North-East. Rail. Co.*, 27 Law, J., Q. B. 417. *Tuff v. Warman*, 27 Law, J., Exch. 322. *Senior v. Ward*, 28 ib. Q. B. 139.

(h) *Jervia, C. J., Martin v. Gt. North.*

Rail. Co., 16 C. B. 192. *Wise v. Gt. West. Rail. Co.*, 1 H. & N. 63; 25 Law, J., Exch. 261.

(i) Domat, liv. 2, tit. 8, s. 4.

(k) *Hill v. Warren*, 2 Stark. 378.

(l) *Butterfield v. Forrester*, 11 East, 60.

(m) *Clayards v. Dethick*, 12 Q. B. 446.

the employer for injuries sustained from the non-observance of the rule (n).

Negligence on the part of the plaintiff forming no impediment to an action for damages.—Negligence or misconduct, on the part of the plaintiff himself, does not prevent him from recovering damages in those cases where the negligence or misconduct has not been an immediate co-operative cause of the injury of which he complains (o). Thus, where the plaintiff improperly left his donkey in a public highway, tied together by the fore-feet, and the defendant carelessly drove over, and killed the ass with his horses and waggon in broad daylight, the animal being unable to get out of the way of the waggon, it was held that the misconduct of the plaintiff, in leaving the ass in the highway, was no answer to the action; for, although the ass might have been wrongfully there, still the defendant was bound to go along the road with care, and at such a pace as would be likely to prevent mischief. "Were this not so, a man might justify the driving over goods left in a public highway, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road" (p).

Where the defendant left his horse and cart unattended in the street, and some little children indulged their natural instinct for play and mischief by climbing into the cart, and whilst one boy was on the wheel another boy set the horse and cart in motion, and crushed the leg of the climbing boy, it was held that the misconduct of the latter, in trespassing upon the cart, and so contributing to the mischief, did not preclude him from recovering damages for the injury. "The blameable carelessness of the defendant's servant," observes Lord Denman, "in leaving the horse and cart unattended, having tempted the child, he ought not to reproach the child with yielding to that temptation. The defendant has been deficient in ordinary care; the child, acting without prudence or thought, has, however, shown these qualities in as great a degree as he could be expected to possess them. His misconduct bears no proportion to that of the defendant, which produced it" (q).

But if a person of full age and mature judgment gets up into the defendant's cart, without any right so to do, and sustains an injury from the negligence of the defendant's servant, the party so trespassing is precluded from recovering damages from the defendant (r).

Of injuries from the negligence of skilled workmen and professional men.—It is the duty of every workman who undertakes the performance of work

(n) *Senior v. Ward*, 28 Law, J., Q. B. 139; 23 Jur. 172.

(o) *Greenland v. Chaplin*, 5 Exch. 248.

(p) *Davies v. Mann*, 10 M. & W. 549.

Mayor of Colchester v. Brooke, 7 Q. B. 376.

(q) *Lynch v. Nurdin*, 1 Q. B. 38.

(r) *Lygo v. Newbold*, 9 Exch. 306; 23 Law, J., Exch. 109.

to execute it with care and diligence, and with the ordinary amount of skill and knowledge incident to his particular craft, art, or profession. If a carpenter undertakes to roof a barn, or build a shed, and employs defective materials, or does his work so negligently and unskilfully that the roof, when finished, will not keep out the rain, he is responsible in damages to his employer (s). If a builder undertakes to build a house, and builds it out of the perpendicular, or neglects to examine the ground and secure proper foundations for the building, and constructs the walls so carelessly and negligently that a settlement and cracks make their appearance, and the structure becomes a dangerous nuisance, the builder is responsible in damages for negligence (t). The degree of skill and diligence which is required from the workman depends upon the nature and extent of his publick profession, and rises in proportion to the value, the delicacy, and the beauty of the work he undertakes to execute, and the fragility and brittleness of the materials intrusted to him to work upon (u). Clock-makers, jewellers, opticians, and all kinds of skilled workmen, and all persons belonging to the learned professions, are responsible in damages if they profess to accomplish more than they are able to perform, and undertake works of skill without being possessed of sufficient skill, or apply less than the occasion requires (x). "Every person," observes Tindal, C. J., "who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake, if he is an attorney, that at all events you shall gain your cause; nor does a surgeon impliedly undertake that he will perform a cure, nor does he undertake to use the highest possible degree of skill, but he undertakes to bring a fair and competent degree of skill" (y).

Injuries from the negligence of attornies and solicitors.—Every client has a right to the exercise, on the part of his attorney, of care and diligence in the execution of the business intrusted to him, and to a fair average amount of professional skill and knowledge; and if attornies have not as much of these qualities as they ought to possess, or if, having them, they have neglected to employ them, the law makes them responsible for the loss which has accrued to their clients from their deficiencies (z). It is the duty of every attorney and solicitor to act with fidelity to his client,

(s) *Broom v. Davis*, cited *Batten v. Butler*, 7 East, 479 n. *Money Penny v. Hartland*, 2 C. & P. 378.

(t) *Harman v. Cornelius*, 5 C. B., N. S. 236; 28 Law J., C. P. 88. *Farnsworth v. Garrard*, 1 Campb. 39. *Duncan v. Blandell*, 3 Stark. 7. *Munro v. Butt*, 8 Ell. & Bl. 788; 22 Jur. 731. *Williams v. Fitzmaurice*, 3 H. & N. 844.

(u) Addison on Contracts, 4th edit., p. 458.

(x) *Seare v. Prentice*, 8 East, 352. *Slater v. Baker*, 2 Wils. 359.

(y) *Lanphier v. Phipps*, 8 C. & P. 479. *Hanche v. Hooper*, 7 O. & P. 81.

(z) *Hart v. Frame*, 6 Cl. & Fin. 209. *Russell v. Palmer*, 2 Wils. 325.

and to keep the secrets of the latter; for "if a man, being intrusted in his profession, deceive him who intrusted him, or if a man retained of counsel become afterward of counsel with the other party in the same cause, or discover the evidence or secrets of the cause; or if an attorney act deceptive, to the prejudice of his client, or make default by collusion with others, whereby his client is injured, an action lies for damages" (a). If an attorney, when his client's deeds are put into his hands, for the purpose of raising money, discloses defects of title to the person who was about to lend, and the client sustains damage therefrom, the attorney is responsible for neglect of duty, and cannot shelter himself from the consequences by showing that he was also employed on the part of the proposed lender, and was actuated by a sense of justice towards him; for whenever an attorney finds that he has a conflicting duty to discharge towards his several clients, he must at once withdraw from the inconsistent employment, and decline to act in the matter. Whenever the attorney has his client's title-deeds put into his hands for any purpose whatever, "he is to consider his lips sealed with a sacred silence as to the whole of their contents" (b).

It is also the duty of every attorney, by reason of the emolument he receives for the exercise of his professional skill, to take care that his client does not enter into any covenant or stipulation that may expose him to a larger responsibility than the nature of the business he is instructed to transact may, in the ordinary course of practice, require. If the stipulations are more onerous in their consequences than usual, the matter should be fully explained to the client, and the unusual extent of liability be made known to him (c).

If an attorney conducting a suit neglects to comply with the practice or orders of the court, and neglects to take some necessary step in the cause, by means whereof all the previous proceedings become useless, he will be responsible in damages to his client (d). And the same consequences follow if he brings an action for his client, within a limited jurisdiction, on a cause of action manifestly arising out of the jurisdiction (e), or negligently suffers judgment to go by default when he is retained to defend an action (f); or fails to instruct counsel properly, and to deliver briefs in sufficient time to enable his counsel effectively to perform the duty intrusted to him; or if he is not present in person, or by his agent, at the trial, to see that the witnesses are forthcoming when

(a) *Com. Dig., Action on the Case for Deceit*, A 5.

(b) *Tindal, C. J., Taylor v. Blacklow*, 3 *Bing. N. C.* 285.

(c) *Stannard v. Ullithorne*, 4 *M. & Sc.* 376; 10 *Bing.* 491.

(d) *Bracey v. Carter*, 12 *Ad. & E.* 373. *Frankland v. Cole*, 2 *Cr. & J.* 590. *Pitt v. Yalden*, 4 *Burr.* 2063.

(e) *Williams v. Gibbs*, 6 *N. & M.* 788.

(f) *Godefroy v. Jay*, 5 *M. & P.* 297; 7 *Bing.* 419.

called upon (g). When present at the trial, it is the duty of the attorney not to suffer the case to be called on, unless he has previously ascertained that all the necessary witnesses are in attendance (h); but he is not bound to search after his counsel, nor is he answerable for the non-attendance or neglect of the latter (i). If he has received instructions from his client not to compromise an action he is retained to prosecute, he will be guilty of a breach of duty if he does compromise, and cannot shelter himself from an action by showing that it was done under the advice of counsel (k), although that circumstance might go in reduction of damages.

"It would be extremely difficult," observes Tindal, C. J., "to define the exact amount of skill and diligence which an attorney undertakes to furnish in the conduct of a cause. The cases, however, appear to establish, in general, that he is liable for the consequences of ignorance or non-observance of the rules of practice of his court, for the want of care in the preparation of the cause for trial, or of attendance thereon with his witnesses, and for the mismanagement of so much of the conduct of a cause as is usually and ordinarily allotted to his department of the profession; but he is not answerable for error in judgment upon points of new occurrence, or of nice or doubtful construction, or of such as are usually intrusted to men in the higher branch of the profession of the law, unless he has thought fit to act upon his own judgment and opinion respecting matters which ought to have been laid before counsel" (l).

If an attorney is employed to investigate the title to an estate, or to seek out an eligible investment, and obtain good security for money advanced, and the title is obviously defective, or the security is manifestly bad or insufficient, the attorney will be responsible in damages for negligence (m). He is not justified in relying upon an extract from a will furnished to him by his client, unless the latter agrees to take the entire responsibility upon himself; but he ought to search for and examine the original will (n). If he relies upon his own judgment and opinion as to the interpretation and legal operation of deeds and conveyances, he does so at his peril. If he draws a wrong conclusion from

(g) *Hawkins v. Harwood*, 4 Exch. 506; 19 Law, J., Exch. 33. *De Rouffigny v. Peale*, 3 Taunt. 483. *Swannell v. Ellis*, 8 Moore, 340; 1 Bing. 347.

(h) *Reece v. Rigby*, 4 B. & Ald. 202.

(i) *Lowry v. Guildford*, 5 C. & P. 234.

(k) *Fray v. Voules*, 28 Law, J., Q. B. 232; 33 Law, T. R. 133.

(l) *Godefroy v. Dalton*, 6 Bing. 468. *Purves v. Landell*, 12 Cl. & Fin. 98.

Shilcock v. Passman, 7 C. & P. 292. *Kemp v. Burt*, 4 B. & Ad. 431. *Long v. Orsi*, 18 C. B. 610. *Coz v. Leech*, 1 C. B., N. S. 617. *Ireson v. Pearman*, 3 B. & C. 812, 813.

(m) *Knights v. Quarles*, 4 Moore, 532; 2 B. & B. 102. *Whitchend v. Greetham*, 10 Moore, 183; 2 Bing. 464. *Howell v. Young*, 5 B. & C. 259.

(n) *Wilson v. Tucker*, 3 Stark. 156.

them, he will be responsible in damages to his client. He ought, therefore, to lay them before counsel, if he wishes to avoid the responsibility of acting upon his own judgment respecting them (o).

If, when retained by a client who is about to advance his money on the security of a mortgage, he has reason to suspect that the intended mortgagor has been insolvent, or in embarrassed circumstances, he will be responsible for a breach of duty if he neglects to make searches in the proper quarter to ascertain whether such intended mortgagor has ever taken the benefit of the Insolvent Act (p). If he neglects to register a judgment, or to file a cognovit or warrant of attorney, or to file writs, and his client sustains damage from his default, he will be responsible for the consequences (q).

SECTION II.

OF ACTIONS FOR NEGLIGENCE—DIRECT AND CONSEQUENTIAL INJURIES.

Actions for compensating the families of persons killed by negligence.—By the stat. 9 & 10 Vict. c. 93, reciting that no action was then maintainable against a person who, by his wrongful act, neglect, or default, might have caused the death of another person, it is enacted that whenever the death of a person shall be caused by any wrongful act, neglect, or default, which, if death had not ensued, would have entitled the party injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued shall be liable to an action for damages, although the death shall have been caused under such circumstances as amount in law to felony. And (s. 2), that every such action shall be for the benefit of the wife, husband, parent, and child of the deceased person, and shall be brought by, and in the name of, his executor or administrator, and the damages recovered, after deducting certain costs, shall be divided amongst the before-mentioned relatives, in such shares as the jury by their verdict shall find and direct. But not more than one action shall (s. 3) be in respect of the same subject-matter of complaint, and the action must be commenced within twelve calendar months after the death of the deceased person, and the plaintiff must

(o) *Ireson v. Pearman*, 3 B. & C. 813; Q. B. 292.
 5 D. & R. 699. (q) *Hunter v. Caldwell*, 10 Q. B. 82;
 (p) *Cooper v. Stephenson*, 21 Law, J., 16 Law, J., Q. B. 274.

deliver (s. 4), together with the declaration of his cause of action, a full particular of the persons on whose behalf the action is brought, and of the nature of the claim (r).

Actions at law, and proceedings in the High Court of Admiralty for the recovery of compensation for injuries caused by negligence.—The High Court of Admiralty has jurisdiction over all causes of action arising from collisions between vessels caused by negligence either in a port or river, or on the British seas or high seas (s). The proceeding in the Court of Admiralty is an action *in rem*, the first step in the process being a seizure of the delinquent ship, which is impounded and detained to answer the plaintiff's claim. The Trinity Masters attend to assist the court, and this has been thought to make it a desirable tribunal for the trial of causes involving questions of nautical skill and science (t).

By the Mercantile Shipping Act, 1854 (17 & 18 Vict. c. 104), it is enacted (s. 512) that in cases where *loss of life or personal injury* has occurred by any accident, in respect of which the shipowner is, or is alleged to be, liable in damages, no person shall be entitled to bring an action until the completion of any inquiry that may be instituted by the Board of Trade, or until the Board of Trade has refused to institute an inquiry; and the Board of Trade is to be deemed to have refused whenever notice has been served on it by any person of his desire to bring an action, and no inquiry is instituted by the Board for one month after service of the notice. And, after the completion of such inquiry, if any person injured estimates the damage at a greater sum than the statutory amount, or the amount accepted by the Board, by way of compensation, such party may, subject to the limitations and restrictions there provided, bring an action for damages (ante, pp. 244–246).

Joint and separate rights of action.—When there are several joint-owners of a chattel which has been damaged or destroyed by negligence, all should be joined as plaintiffs; and if they are not so joined, the defendant may object to the non-joinder, in order that he may not be harassed by several actions for the same cause (u). Where two persons were owners of a ship in unequal proportions as tenants-in-common, Addison being the owner of a fourth part, and the plaintiff of the remaining three-fourths, and the former brought an action against the defendants, the owners of another ship, for wrongfully running down and injuring the vessel in which the plaintiff was interested, and the defendants omitted to plead the non-joinder of the other part-owner in abatement, and the

(r) *Duckworth v. Johnson*, 4 H. & N. 653.

(s) 4 Instit. c. 22; 7 & 8 Vict. c. 2; 3 & 4 Vict. c. 65.

(t) *The Anne & Mary*, 2 W. Rob. 196; and see 23 Jur. part 2, 483.

(u) Ante, pp. 10, 106; post, ch. 19.

plaintiff had judgment, and obtained full satisfaction for all the damage that he had sustained to his share of the ship, and afterwards the owner of the remaining three-fourths of the ship sued the defendants for the damage he had sustained, and the defendants pleaded the non-joinder of the other part-owner in abatement, and the plaintiff then set forth in his replication the proceedings in the former action, it was held that as the other part-owner had already received satisfaction, he could not be entitled to any part of the damages to be recovered in that action, and that he need not, consequently, be joined as a plaintiff (*x*).

Parties to be made defendants—Master and servant.—The party himself, who actually inflicts the injury through his own negligence, is of course always responsible for the injurious consequences of his default. "Those," observes Domat, "who construct works, or who do any other thing from whence may ensue damage to others, will be answerable for that damage, if they have not taken the necessary precautions to prevent it. Thus masons, carpenters, and others, who carry materials up their scaffolds, and those who, from the top of a tree, cut down the branches thereof, must give timely warning to all persons likely to be endangered by their proceedings, and will be answerable in damages if they neglect so to do (*y*); but as these parties are generally acting under the directions of some master and employer, and are unable themselves to make compensation in damages to the parties injured, the law properly holds the master and employer responsible for the act of his servant, whether the work is done by a domestic servant or day-labourer, or by a person who works by the job or piece, and contracts to do the work for a specific sum (*z*); provided always, that the workman is an ordinary labourer, personally engaged in the execution of the work acting under the control of the employer, and not a contractor exercising an independent employment, and selecting his own servants and workmen for the performance of the work (*a*).

If the person for whom the work is done selects the servant who is to do it, that will not relieve the master of such servant from liability for his negligence (*b*).

A servant who merely hires labourers for the performance of the master's work, is not answerable for the negligence of such fellow-servants, or for injuries inflicted by them in the course of their employment. Thus a gardener, or a steward, who employs labourers under him to do his master's work, is not answerable for the defaults or improper conduct of such labourers causing damage to a third party. In such cases the action

(*x*) *Sedgworth v. Overend*, 7 T. R. 280.
Blazam v. Hubbard, 5 East, 420.

(*y*) Domat, liv. 2, tit. 8, s. 4.

(*z*) Ante, pp. 159, 241. *Birket v. Whitehaven Func. Rail. Co.*, 4 Exch. 137.

(*a*) *Sadler v. Henlock*, 4 Ell. & Bl. 578;
 24 Law, J., Q. B. 138.

(*b*) *Holmes v. Owion*, 2 C. B., N. S. 790;
 26 Law, J., C. P. 263.

must either be brought against the hand committing the injury, or against the owner for whom the act was done (c), or against both the one and the other jointly (d).

Where the lessee of a ferry hired of the defendants a steamer, with a crew, for the day, to carry his passengers, it was held that the defendants were liable for injuries caused to the passengers by the negligence of the crew, who were the servants of the defendants, although the passengers contracted with the lessee of the ferry for conveyance in the steamboat, and paid their fares to such lessee (e).

The liability of any one other than the party actually doing the act from whence the injury results, proceeds on the maxim *qui facit per alium facit per se*. The employer has the selection of the party employed, and it is reasonable that he who has made choice of an unskilful or careless person to execute his orders, should be responsible for any injury resulting from the want of skill or want of care of the person employed; but neither the principle of the rule nor the rule itself can apply to a case where the party sought to be charged does not stand in the character of employer to the party by whose negligent act the injury has been occasioned (f).

The master is not relieved from his responsibility for the wrongful act of his servant whilst doing his master's work, merely because an Act of Parliament has limited and controlled the choice of the master in the selection of his servants, and has compelled him to choose from a particular class of skilled or educated persons, supposed to be peculiarly fitted for the performance of the duties intrusted to them to discharge (g).

The general rule is, that the party injured by the negligence of another cannot go beyond the party who actually did the injury, unless he can establish that the latter stood in the relation of a servant to the defendant, or that the injury was the natural result of the orders given by the latter, and that those orders could not be carried into effect without causing the mischief. There are two classes of cases: the first, where the act is done under the order of the employer, and the order cannot be obeyed without doing what is complained of; the second, where the improper mode of doing what might be rightly done occasions the mischief.

Endeavours have been made to hold all parties liable from whom the act ultimately originates; but it has been holden, that if the act ordered to be done can be lawfully done without injury to others, the act of the person personally engaged in doing the mischief is not the act of the

(c) *Stone v. Cartwright*, 6 T. R. 411.

(d) *Wilson v. Peto*, 6 Moore, 40.

(e) *Dalyell v. Tyrer*, 28 Law, J., Q. B.

(f) *Reedie v. Lond. & North West. Rail. Co.*, 4 Exch. 255.

(g) *Martin v. Temperley*, 4 Q. B. 298.

person who set him in motion, unless the relationship of master and servant can be established between them.

Contractor and subcontractor.—Although, therefore, a person has ordered or directed a particular thing to be done, yet if he does not employ his own servants and workmen to do it, but intrusts the execution of the work to a person who exercises an independent employment, and has the immediate dominion and control over the workmen engaged in the work, he is not responsible for injuries done to third parties from the negligent execution of the work (*h*), unless a nuisance is thereby created and continued on his own premises (*ante*, p. 106). Thus, where a butcher employed a licensed drover in the way of his ordinary calling to drive a bullock from Smithfield to the butcher's slaughter-house, and the drover negligently sent an inexperienced boy with the bullock, who drove the beast into the plaintiff's show-room, where it broke several marble chimney-pieces, it was held that the butcher was not answerable for the damage (*i*). And where a company, empowered by Act of Parliament to construct a railway, contracted under seal with certain persons to make a portion of the line, and by the contract reserved to themselves the power of dismissing any of the contractors' workmen for incompetence, and the workmen, in constructing a bridge over a highway, negligently caused the death of a person passing beneath along the highway, by allowing a stone to fall upon him, it was held in an action against the company by the administratrix of the deceased that they were not liable (*k*). But where the defendants, who were occupiers of a bonded warehouse in Liverpool, employed a master-porter for the purpose of removing some barrels of flour from their warehouse and lowering them into a cart, and the master-porter used his own tackle, and brought and paid his own men; and, through the negligence of the men or the insufficiency of the tackle, one of the barrels slipped from the tackle whilst it was being lowered into the cart, and fell upon the plaintiff and injured him, it was held that the defendants were responsible for the injury (*l*). Here the work, it has been observed, was in effect done by the defendants themselves at their own warehouse, the workmen, though engaged by the master-porter, being under the control of the defendants, and acting substantially as their servants (*m*).

Negligence of servants working under contractors and subcontractors.—Where work which can lawfully be done without injury to others is placed in the hands of a contractor, who selects his own workmen and servants for the performance of the work, and directs the manner of doing it,

(*h*) *Guthbertson v. Parsons*, 12 C. B. 304.

(*i*) *Milligan v. Wedge*, 4 Ad. & E. 737.

(*k*) *Reedie v. Lond. & N. W. Rail. Co.*, 4 Exch. 244.

(*l*) *Randleston v. Murray*, 8 Ad. & E. 109.

(*m*) *Denman, C. J.*, 12 Ad. & E. 741; and see *ante*, pp. 106–108.

exercising his own judgment in the matter, and having the immediate control over the workmen, such contractor, and not the person who employs him, is the party responsible for injuries to strangers from the negligent execution of the work (n). And if the work is done under the immediate control and superintendence of a subcontractor, then the latter is the party responsible for any wrong done by the workmen he employs in the execution of the work. It must not be understood, however, that a contractor cannot become liable for the negligence of his subcontractor. If the contractor personally interferes and gives directions to the latter, or to the workmen employed by him, he would be responsible for the orders given, but he cannot be charged simply on the ground of his filling the character of contractor (o).

Where a builder had contracted with the committee of a club to make alterations and improvements in the club-house, and prepare and fix the necessary gas-fittings, and the builder made a subcontract with a gas-fitter to do this latter portion of the work, and the gas-fitter's workmen allowed the gas to escape and cause an explosion which injured the butler of the club and his wife, it was held that the gas-fitter, and not the builder, was liable for the negligence (p).

Voluntary and involuntary trespasses—Direct and consequential injuries.—If a squib is thrown amongst a crowd in a public place, and is then tossed from one person to another, the first thrower, and all who have tossed the squib otherwise than in pure self-defence, are responsible for the injury it occasions (q). "If I ride upon a horse, and J. S. whips the horse so that he runs away with me and runs over any other person, he who whipped the horse is guilty of the battery, and not me. But if I, by spurring, was the cause of such accident, then am I guilty. In the same manner, if A takes the hand of B, and with it strikes C, A is the trespasser and not B" (r).

"If," observes Lord Denman, "I am guilty of negligence in leaving anything dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third party, and if that injury should be so brought about, the sufferer may have redress by action against both or either of the two, but unquestionably against the first. If, for example, a gamekeeper, returning from his daily exercise, should rear his loaded gun against a wall in the playground of school-boys, and one of these should playfully point the gun at a schoolfellow, and fire it off and maim him, the gamekeeper must

(n) *Steel v. S. E. R. Co.*, 16 C. B. 550.

(o) *Overton v. Freeman*, 11 C. B. 878; 21 Law, J., C. P. 52.

(p) *Rapson v. Oubell*, 9 M. & W. 710.

(q) *Scott v. Shepherd*, 3 Wils. 408.

(r) *Gibbons v. Pepper*, 1 Id. Raym. 88. Bac. Abr. TRESPASS, D. 2.

answer in damages to the wounded party" (s). If a horse and cart are left standing in the street without any person to watch them, and a person strikes the horse and causes it to back against a shop-window, the owner is liable for the damages, for he must, as we have seen, take the risk of all the consequences that result from the horse being left unattended (t). In such a case the owner, who has left his cart unattended, and the person who struck the horse, are both liable for the injury (t).

"If I deliver my horse to a smith to shoe, and he delivers him to another smith, who pricks him, I may have an action on the case against the latter, though I did not deliver the horse to him. So, if I deliver goods to A, who delivers them to B, to keep to the use of A, and A wastes these goods, I may have an action on the case against B, though I did not deliver the goods to him" (u).

Joint and separate liabilities.—If several co-proprietors of a stage-coach intrust the driving of the coach to one of them, all will be responsible for injuries caused by his negligent driving (x). And if two omnibuses are racing, and one of them runs over a man who is crossing the road and has not time to get out of the way, the injured party has a remedy against the proprietor of either omnibus (y).

Declarations for injuries from negligence must set forth either an injury to the property or to the person of the plaintiff, or to both. If the injury is an injury to goods and chattels, the declaration must allege them to be the goods and chattels of the plaintiff; for if there is no averment to this effect, and nothing on the record to show the plaintiff's right or title to the chattels or to the possession of them, there is no cause of action (z). The declaration for an injury to a ship or carriage through the negligent management of another ship or carriage by the defendant or his servants, should set forth the plaintiff's possession of his ship in a certain river or of his carriage on a certain highway, and the defendant's possession of another ship in the same river or of another carriage on the same highway, and that the defendant navigated his ship or drove his carriage in so negligent a manner, that the ship or carriage, through his carelessness and mismanagement, ran foul of the plaintiff's ship or carriage, and injured the same, and wetted and spoiled divers goods and chattels in the said ship, and caused the plaintiff to incur great expenses in repairing, &c., and caused the plaintiff to be deprived of the use of his ship, &c., and to lose the profits of a voyage, concluding with a claim of damages (a).

If the plaintiff complains of an injury to the person, the declaration

(s) *Lynch v. Nurdin*, 1 Q. B. 36.

(t) *Thidge v. Goodwin*, 5 C. & P. 192.

(u) Roll. Abr. 90. *Loeschman v. Ma-*
chin, 2 Stark, 311.

(v) *Moreton v. Hardern*, 4 B. & C. 228.

(y) *Cresswell, J.*, 8 C. B. 121.

(z) *Pritchard v. Long*, 9 M. & W. 666.
Forman v. Dawes, Car. & M. 129.

(a) *Leame v. Bray*, 3 East, 593.

will either be for an immediate injury, such as an assault (post, ch. 14) or trespass, or a consequential injury, such as the breaking of the plaintiff's leg through the upsetting of a coach negligently driven by the defendant (*b*), or the loss of the plaintiff's eye through the negligence of the defendant in entrusting a loaded gun to the care of a young and inexperienced person, who carelessly shot off the gun pointed at the plaintiff (*c*). If the cause of action be a breach of duty, arising *ex contractu*, the circumstances and the nature of the contract or employment creating the duty must be truly set forth on the face of the declaration, and be supported by the evidence at the trial (*d*).

A declaration alleging that the plaintiff was the servant of the defendant, and that the defendant ordered the plaintiff to ascend and use certain scaffolding, &c., well knowing it to be dangerous and unfit for use, and that the plaintiff, in obedience to the order of the defendant, used the scaffolding, &c., believing it to be safe and fit for use, and not knowing the contrary, and not having the same means that the plaintiff had of forming a correct opinion upon its sufficiency and safety, and that the scaffolding, &c., by reason of its being unsafe and unfit for use, gave way with the plaintiff upon it, and precipitated the plaintiff upon the ground, &c., discloses a good cause of action (*e*).

If the plaintiff complains of injuries received by the upsetting of a coach in which he was riding as a passenger, the declaration should allege that the defendant was the proprietor of a stage-coach, and that the plaintiff was received by him as a passenger, to be carried safely for hire, and that the defendant did not take proper care in the driving and management of the coach, but suffered the coach to be overloaded, &c., stating the facts constituting the act of negligence, and the injury resulting to the plaintiff, and claiming damages.

The allegation in the declaration that the plaintiff was to be safely carried, does not mean that he is to be conveyed safely absolutely, like a bale of goods, but that he is to be carried with due care (*f*).

Of the plea of not guilty.—The plea of not guilty in actions for injuries, caused by the negligence of the defendants, operates as a denial only of the wrongful act alleged to have been committed by the defendant, and no defence other than such denial is admissible under that plea. All other pleas in denial must take issue on some particular matter-of-fact alleged in the declaration (*g*). If the plaintiff complains of damage

(*b*) *Curtis v. Drinkwater*, 2 B. & Ad. 189.

(*c*) *Dixon v. Bell*, 5 M. & S. 198.

(*d*) *Lopes v. De Tastet*, 4 Moore, 279; ante, p. 109.

(*e*) *Williams v. Clough*, 27 Law, J.,

Exch. 325.

(*f*) *Harris v. Costar*, 1 C. & P. 636. *Aston v. Heaven*, 2 Esp. 535.

(*g*) Reg. Gen. Hil. Term, 16 Vict., 1 Ell. & Bl., App. lxxxi. lxxxi.; post, ch. 20.

done to his goods and chattels, or personal property, through the negligence of the defendant or his servants, the plea of not guilty operates as a denial only of the defendant's having committed the wrong alleged by damaging the goods mentioned, but not of the plaintiff's property therein (h). The defendant cannot, therefore, under the plea of not guilty, show that the damaged chattel did not belong to the plaintiff, or that it was not in his possession at the time of the injury (i). But where the plaintiff's own negligence is the immediate cause of the injury, or has contributed to the mischief of which he complains, the defence is admissible under the plea of not guilty (k). And if the injury was the result of an inevitable accident, and was not occasioned by any default on the part of the defendant, the defendant will be entitled to a verdict under a plea of not guilty. This has been held to be the case where a horse, being frightened by a clap of thunder, ran away with the defendant, and knocked down the plaintiff (l); also, where a horse, being frightened by the noisy and rapid approach of a butcher's cart, furiously driven, became ungovernable, and ran against and killed another horse, notwithstanding all the efforts of the defendant to control the animal (m). But where an action was brought against the defendant for running over the plaintiff with a horse and cart, and breaking his leg, it was held that the defendant could not, under a plea of not guilty, show that there was no negligence on his part, but that the plaintiff accidentally slipped from the pavement at the moment when the cart was passing, and had so got his leg under the wheel. "The authorities show," observes Lord Denman, "that if the accident had resulted entirely from a superior agency, that would have been a defence, and might have been pleaded under the general issue; but a defence admitting that the injury resulted from an act of the defendant is not so proveable" (n).

Evidence at the trial—Proof of negligence.—Proof of the commission by the defendant, or his servants, of the injury of which the plaintiff complains, very generally carries with it *prima facie* proof of negligence, and it is for the defendant to show that the injury was the result of inevitable accident (ante, pp. 140, 237), or that it was occasioned by the negligence or misconduct of the plaintiff himself (ante, pp. 95, 249, 250), or by circumstances over which the defendant had no control (ante, pp. 238–240).

Where an Act of Parliament directed a water-company to lay down pipes, with plugs in them, as safety-valves to prevent the bursting of the

(A) Reg. Gen. Hil. Term, 16 Vict., 1 Ell. & Bl., App. lxxxii. lxxxiii.

(i) *Hart v. Crowley*, 12 Ad. & E. 378. *Taverner v. Little*, 5 Bing. N. C. 678.

(k) *Bridge v. Grand Junc. Rail. Co.*, 3 M. & W. 244. *Holden v. Liv. Gas Co.*,

3 C. B. 1; 15 Law, J., C. P. 301.

(l) *Gibbon v. Pepper*, 2 Salk. 636; *Ld. Raym.* 38. *Hall v. Fearnley*, 3 Q. B. 919.

(m) *Wakeman v. Robinson*, 1 Bing. 213.

(n) *Hall v. Fearnley*, 3 Q. B. 921.

pipes, and the plugs were properly made, and of proper material, and a severe frost came and prevented the plugs from acting, and the pipes burst and flooded the plaintiff's cellar, it was held that there was no evidence of negligence against the company (o).

A declaration which charges the defendant with having negligently driven his cart against the plaintiff's horse, or with having so negligently kept his fire that it spread to and consumed the plaintiff's corn, is supported by proof that the defendant's servant negligently drove the cart, or lighted and kept the fire (p), (ante, pp. 129, 159, 241). But in order to make the master responsible, it is not sufficient to show that his servant has been guilty of negligence in driving, it must be shown that the servant was driving at the time with the authority of the master on his business; but it is not necessary to prove any express request or order by the master to the servant to use the master's horse or carriage. If at the time of the injury the servant appears to have been driving his master's carriage in the ordinary course of his employment, the master will be *prima facie* responsible (q).

If the action is brought under the statute 9 & 10 Vict. c. 93, for compensating the families of persons killed by accident (ante, p. 254), it must be proved that actual pecuniary damage has been sustained by the relatives of the deceased person, and that the plaintiff, who sues as administrator, or the person for whose benefit the action is brought, had some pecuniary interest in the life of the person killed. It was intended by the act to give compensation for damage actually sustained, and not to enable persons to sue in respect of some imaginary damage, and so punish those who are guilty of negligence, by making them pay costs; but the loss of anticipated benefit, founded on a reasonable and just expectation of pecuniary advantage derivable from the continuance of the life of the deceased, may be the subject-matter of damage, and a sufficient foundation for an action (r).

If the plaintiff complains of a breach of duty on the part of the defendant, in his character of an attorney, it must be clearly shown that it was the duty of the defendant to do that which he is charged with having neglected. If the matter is at all left in doubt, he is clearly entitled to the benefit of the doubt (s).

Proof of the ownership of chattels damaged by negligence.—Where the plaintiffs hired a chariot for the day, appointed the coachman, and

(o) *Blyth v. Birmingham Water Co.*, 11 Exch. 781.

(p) *Brucker v. Fromont*, 6 T. R. 669.
Turberville v. Stampe, 1 Ld. Raym. 264.
Croft v. Alison, 4 B. & Ald. 590.

(q) *Patten v. Bea*, 2 C. B., N. S. 613;

26 Law, J., C. P. 237.

(r) *Duckworth v. Johnson*, 4 H. & N. 659.

(s) *Chapman v. Van Toll*, 8 Ell. & Bl. 396; 27 Law, J., Q. B. 1; ante, pp. 251-254.

furnished the horses, it was held that they were properly described as owners and proprietors of the carriage in a declaration against a defendant for an accident arising from his servant's negligence in driving against the chariot (t).

Evidence for the defence—Questions for the jury.—If it appears that there was negligence on the part of the plaintiff (ante, pp. 95, 249, 250), as well as on the part of the defendant, the proper question for the jury is, "whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune by his own negligence, or want of ordinary and common care and caution, that, but for such negligence or want of ordinary care and caution on his part, the misfortune would not have happened. In the first case the plaintiff would be entitled to recover, in the latter not, as, but for his own misconduct, the misfortune would not have happened. Mere negligence, or want of ordinary care or caution, would not, however, have disentitled him to recover, unless it was such that, but for the negligence and want of ordinary care and caution, the misfortune would not have happened; or if the defendant might, by the exercise of caution on his part, have avoided the consequences of the neglect or carelessness of the plaintiff" (u).

In an action for damage resulting from the negligent driving of the defendant's servant, the proper question for the jury is, whether at the time of the commission of the injury the servant was driving on his master's business and with his authority (x).

In actions against an attorney for negligence, it is the province of the judge to inform the jury for what species or degree of negligence an attorney is properly answerable, and what duty is cast upon him by law, or by the practice of the court in the particular instance, and leave them to say whether the attorney has performed his duty; and in case of non-performance, whether the neglect was of that sort or degree which is venial or culpable in the sense of sustaining or not sustaining an action (y).

Damages recoverable.—In cases of injuries to chattels from negligence, the measure of damages is the actual deterioration in the value of the chattel, and if the owner has been deprived of the use of the chattel, and has been obliged to hire another chattel, and been put to expense, and has sustained special damage, which is the natural and necessary result of the wrongful act, such damages are recoverable if claimed in the plaintiff's

.. (t) *Croft v. Alison*, 4 B. & Ald. 500.

(u) *Tuff v. Warman*, 2 C. B., N. S. 740;

27 Law, J., C. P. 823; ante, pp. 95, 249.

(x) *Patten v. Bea*, 2 C. B., N. S. 606;

26 Law, J., C. P. 235.

(y) *Hunter v. Caldwell*, 10 Q. B. 82;

12 Jur. 285.

declaration. In an action for an injury to a horse from negligent driving, it was held that the proper measure of damages was the keep of the horse at a farrier's, the amount of the farrier's bill, and the difference between the value of the horse at the time of the accident and at the time of the commencement of the action (z).

Damages recoverable in respect of the negligent navigation of vessels.—

The liability of a shipowner for damage done by the negligent management of his vessel, causing a collision with another vessel, is, as we have seen, limited to the value of his vessel and freight at the time of such collision: and if the vessel instantly founders, he is not thereby exempted from liability (a). The value is to be taken at the moment of collision (b). Where the plaintiff in consequence of the collision has been obliged to avail himself of the assistance of persons who demand an exorbitant sum for salvage, and it is reasonable and prudent to resist this demand, and costs are incurred in resisting it, the plaintiff will be entitled to recover these costs if he claims them in his declaration as part of the damages (c).

*Damages recoverable from injuries and losses through acts of negligence when the plaintiff is insured against loss, or has received full indemnity under a contract of insurance.—*The recovery of full compensation for loss or damage to property under a contract with insurers, cannot be given in evidence in reduction of damages in an action against the wrong-doer who has done the mischief. The plaintiff's contract with the underwriters or insurers is res inter alios acta, of which the defendant who is sued for negligence cannot avail himself. If it were not so, the wrong-doer would take the benefit of a policy of insurance without paying the premium (d). A plaintiff, however, who has received a full indemnity for his loss under a contract of insurance, and has afterwards recovered compensation in an action for damages against the wrong-doer, is not entitled to a double satisfaction, but is bound to hand over the damages to the insurer or underwriter, who is the party really damnified by the wrongful act (e).

*Of the damages recoverable in actions by personal representatives in cases of death from any wrongful act, or from negligence.—*In all actions by the personal representatives of persons killed by negligence brought under the stat. 9 & 10 Vict. c. 93 (ante, p. 254), to recover damages proportioned to the injury resulting from his death, to the persons for whose benefit the action is brought, the jury in assessing the damages must confine themselves to injuries of which a pecuniary estimate may be made, and

(z) *Hughes v. Quentin*, 8 C. & P. 703.

(a) *Brown v. Wilkinson*, 15 M. & W. 391.

(b) *The Mary Caroline*, 13 Jur. 945.

(c) *Tindall v. Bell*, 11 M. & W. 228.

(d) *Yates v. Whyte*, 4 Bing. N. C. 288.

(e) *Ante*, p. 133; and post, ch. 21.

cannot lawfully increase them by adding a solatium to those parties in respect of the mental sufferings occasioned by such death. They cannot, therefore, lawfully inquire into the degree of mental anguish which each member of the family has suffered from the bereavement, and cannot take into consideration the mental sufferings of a widow or child for the loss of a husband or a parent (*f*). It is clear, also, that the damages are not to be given merely in reference to the loss of any legal right against the deceased, which might have been turned to profit if he had lived, and which has been lost by his death, for the damages recovered are to be distributed amongst the relations only, and not to all individuals sustaining loss; and, accordingly, the practice has been to ascertain what benefit could have been claimed from the deceased if he had lived by the party seeking to obtain damages, and if he can show that he had a reasonable expectation of pecuniary benefit from the continuance of the life, and is within the requisite degree of relationship, his claim may fairly be considered by the jury in assessing the amount of damages (*g*). No damages can be given in respect of funeral expenses and mourning, there being no language in the statute referring to these expenses and rendering them recoverable (*h*).

(*f*) *Blake v. Mid. Rail. Co.*, 21 Law, J., Q. B. 293; 18 Q. B. 93. *Armsworth v. S. E. R. Co.* 11 Jur. 759.

(*g*) *Franklin v. S. E. Rail. Co.* 3 H. &

N. 214; 4 Jur. N. S. 565.

(*h*) *Dalton v. S. E. R. Co.*, 4 C. B., N. S. 296; 27 Law, J., C. P. 227.

CHAPTER VIII.

OF NEGLIGENCE AND BREACH OF DUTY ON THE PART OF BAILEES—DETENTION AND LOSS OF CHATTELS BY BAILEES.

SECTION I.—*Of the negligent keeping and management, and unlawful detaining, of chattels by bailees.*—Bailments of chattels—Injuries to chattels in the hands of bailees—Loss by robbery and theft—Losses occasioned by the negligence of the bailor—Loss of goods by persons who have received them to be carried, but who are not common carriers—Limitation of the liability of shipowners in respect of the carriage of chattels—Detention of chattels by bailees claiming lien—Of the ordinary lien of workmen and artificers—General and particular liens—Lien of factors, brokers, bankers, attorneys, and solicitors—Extinguishment of liens—Detention of chattels by one of several

joint-owners or tenants-in-common—Re-delivery of chattels to one of several bailors.

SECTION II.—*Of actions for the negligent management, negligent keeping, and unlawful detaining of goods and chattels.*—Parties to actions for detaining chattels—Power of bailees to compel rival claimants to interplead and establish their title—Declarations against bailees for negligence and breach of duty—Pleadings, defences, evidence, and damages recoverable—Orders for the delivery of the specific thing detained—Assessment of the value thereof—Assessment of damages where all or part of the things detained have been delivered up after action.

SECTION I.

OF NEGLIGENCE AND BREACH OF DUTY ON THE PART OF BAILEES—DETENTION AND LOSS OF CHATTELS BY BAILEES.

Of bailments of chattels.—"There are," observes Holt, C. J., "six sorts of bailments: The first is a bare, naked bailment of goods delivered by one man to another, to keep for the use of the bailor; and this I call a depositum, and it is that sort of bailment which is mentioned in *Southcote's* case. The second sort is, when goods or chattels that are useful are lent to a friend gratis, to be used by him; and this is called commodatum, because the thing is to be restored in specie. The third sort is, when goods are left with the bailee to be used by him for hire; this is called locatio et conductio, and the lender is called locator, and the borrower conductor. The fourth sort is, when goods or chattels are

delivered to another as a pawn, to be a security to him for money borrowed of him by the bailor; and this is called, in Latin, *vadium*, and in English, a pawn or a pledge. The fifth sort is, when goods or chattels are delivered to be carried, or something is to be done about them for a reward to be paid by the person who delivers them to the bailee, who is to do the thing about them. The sixth sort is, when there is a delivery of goods or chattels to somebody who is to carry them, or do something about them *gratis*, without any reward for such his work or carriage" (i).

Of the negligent keeping of chattels by bailees.—"As to the first sort of bailment," further observes Holt, C. J., "where a man takes goods into his custody to keep for the use of the bailor, such a bailee is not answerable if they are stole without any fault in him, neither will a common neglect make him chargeable; but he must be guilty of some gross neglect. If he keeps the goods bailed to him but as he keeps his own, though he keeps his own but negligently, yet he is not chargeable for them; for the keeping them as he keeps his own is an argument of his honesty" (k). But if he is guilty of gross negligence, it is no answer to say that he lost his own goods at the time he lost the goods of the bailor (l).

"As to the second sort of bailment—viz. *commodatum*, or lending *gratis*—the borrower is bound to the strictest care and diligence to keep the goods, so as to restore them back again to the lender; because the bailee has a benefit by the use of them, he will be answerable if he be guilty of the least neglect: as if a man should lend another a horse to go in one direction, or for one month, and the bailee goes in another direction, or keeps the horse above a month, and an accident happen to the horse, the bailee will be chargeable, because he has made use of the horse contrary to the trust he was lent to him under; and it may be, that if the horse had been used no otherwise than as he was lent, that accident would not have befallen him. If the bailee put the horse in his stable, and he were stolen from thence, the bailee shall not be answerable for him; but if he or his servant leave the house or the stable-doors open, and thieves take the opportunity of that and steal the horse, he will be chargeable; because the neglect gave the thieves the occasion to steal the horse. Bracton says the bailee must use the utmost care; but yet he shall not be chargeable where there is such a force as he cannot resist" (m).

"The duties of the borrower and lender," observes Coleridge, J., "are in some degree correlative. The lender must be taken to lend for the pur-

(i) *Coggs v. Bernard*, 1 Smith's L. C. 152.

(k) Holt, C. J., *Coggs v. Bernard*, *Ld. Raym.* 909; 1 Smith's L. C. 147. *Walker*

v. Guar. Assocn., 18 Q. B. 286; 21 *Law, J.*, Q. B. 257.

(l) *Doorman v. Jenkins*, 2 *Ad. & E.* 258.

(m) *Coggs v. Bernard*, *Ld. Raym.* 911.

pose of a beneficial use by the borrower; the borrower, therefore, is not responsible for reasonable wear and tear, but he is for negligence, for misuse, for gross want of skill in the use; above all, for anything which may be defined as legal fraud. So, on the other hand, as the lender lends for beneficial use, he must be responsible for defects in the chattel with reference to the use for which he knows the loan is accepted, of which he is aware, and owing to which, directly, the borrower is injured. ‘*Adjuvari quippe nos, non decipi, beneficio oportet*,’ is the maxim which Story borrows from the ‘Digest;’ and Pothier is express to the same effect, citing, as Story does also, the instance, ‘*Qui sciens vasa vitiosa commodavit, si ibi infusum vinum, vel oleum corruptum effusumve est, condemnandus eo nomine est*.’ This is so consonant to reason and justice that it has become part of our law. If, therefore, the owner of a horse, knowing it to be vicious and unmanageable, and highly dangerous to ride, should lend it to one who is ignorant of its bad qualities and conceals them from him, and the rider using ordinary care and skill is thrown and injured, the lender would be responsible. By the necessarily implied purpose of the loan, a duty is contracted by the lender towards the borrower not to conceal from him those defects, known to the lender, which may make the loan perilous to him” (n).

“As to the third sort of bailment, *scilicet locatio*, or lending for hire, in this case the bailee is also bound to take the utmost care, and to return the goods when the time of hiring is expired; for when goods are let out for reward the hirer is bound to such care as the most diligent father of a family uses; and if he uses that he shall be discharged. But every man, how diligent soever he be, being liable to the accident of robbers, though a diligent man is not so liable as a careless man, the bailee shall not be answerable if the goods be stolen” (o).

The owner must stand to all the ordinary risks to which the chattel is naturally liable, but not to risks occasioned by negligence or want of ordinary caution on the part of the hirer. If a carriage, for example, let to hire, breaks down on the ordinary public thoroughfare, through the badness of the road, or is injured by a flood or inundation, the owner must bear the loss, although the carriage was driven by the servant and horses of the hirer. But if the hirer had gone out of his way to meet the danger—if he had travelled by unusual and difficult roads, or crossed a plain subject to floods, when he might have kept the high ground and been safe, he must make good the loss that has been occasioned thereby. If the owner sends his own postillion or coachman to drive the carriage, the hirer

(n) *Blackmore v. Brist. & Exeter Rail. Co.*, 8 Ell. & Bl. 1051; 27 Law, J., Q. B. 167.

(o) *Ld. Holt, Coggs v. Bernard*, Ld. Raym. 900.

is discharged from all attention to the horses and the risks of the road, and is bound only to take ordinary care of the glasses and inside of the carriage whilst he sits in it, unless he officiously interferes and gives orders, and takes the management and direction of the vehicle into his own hands (*p*). If a horse is hired as a saddle-horse, the hirer has no right to use it in a cart, or as a beast of burden. If it is hired to go to Richmond he has no right to go with it to York; and if during such misuser a loss occurs, the hirer will be responsible therefor.

If a horse hired for a journey is taken ill on the road, and the hirer calls in a farrier, he will not be responsible if the horse dies, although the death may have been occasioned by the injudicious treatment of the latter; but if the hirer neglects to avail himself of proper advice and assistance, or chooses ignorantly to prescribe himself, and from unskilfulness gives the horse improper medicine, and the horse dies, he is liable to the owner for the loss (*q*). It is of course the primary duty of the hirer, in the absence of an express stipulation to the contrary, to supply an animal hired by him with suitable food, during the time it is entrusted to him for use; and if a hired horse is exhausted, or becomes ill and refuses its feed, and the hirer notwithstanding pursues his journey, and by so doing injures or kills the horse, he will be responsible therefor to the owner (*r*).

“As to the fourth sort of bailment, viz. vadium or a pawn, if the pawn be such as will be the worse for using, the pawnee cannot use it as clothes, &c.; but if it be such as will be never the worse, as jewels pawned to a lady, she might use them; but then she must do it at her peril: for whereas if she keeps them locked up in her cabinet, if her cabinet should be broken open, and the jewels taken from thence, she would be excused; if she wears them abroad, and is there robbed of them, she will be answerable. And the reason is, because the pawn is in the nature of a deposit, and is not liable to be used. But if the pawn be of such a nature that the pawnee is at any charge about the thing pawned to maintain it, as a horse, cow, &c., then the pawnee may use the horse in a reasonable manner, or milk the cow, &c., in recompense for the meat. And as to neglects for which the pawnee shall make satisfaction, Bracton tells us that if a creditor takes a pawn he is bound to restore it upon payment of the debt; but yet if the pawnee uses true diligence in keeping of the pawn it is sufficient; and, notwithstanding the loss of it, he may resort to the pawnor for his debt. And the true reason of all these cases is that the law requires nothing extraordinary of the pawnee, but only that he

(*p*) Jones, Bailm. 88. Pothier, LOUAGE, No. 106, 190; Tr. des Oblig. 1, 543.

(*q*) *Deane v. Keate*, 3 Campb. 4.

(*r*) *Handford v. Palmer*, 5 Moore, 79; 2 B. & B. 359. *Bray v. Mayne*, 1 Gow. N. P. C. 1.

shall use an ordinary care for restoring the goods (s). But, indeed, if the money for which the goods were pawned be tendered to the pawnee before they are lost, then the pawnee shall be answerable for them; because the pawnee, by detaining them after the tender of the money, is a wrong-doer; and a man that keeps goods by wrong must be answerable for them at all events, for the detaining of them by him is the reason of the loss. The same law holds in relation to goods found."

"As to the fifth sort of bailment, viz. a delivery to carry, or otherwise manage, for a reward, to be paid to the bailee, those cases are of two sorts: either a delivery to one that exercises a public employment, or a delivery to a private person. First, if it be to a person of the first sort, and he is to have a reward, he is bound to answer for the goods at all events. And this is the case of the common carrier, common hoyman, master of a ship, &c. (post, ch. 9). The second sort are bailees, factors, and such-like; and though a bailee is to have a reward for his management, yet he is only to do the best he can, and if he be robbed, &c. it is a good account."

"As to the sixth sort of bailment, it is to be taken that the bailee is to have no reward for his pains, and that by his ill-management the goods are spoiled. Then the bailee, having undertaken to manage the goods, and having managed them ill, and so by his neglect a damage has happened to the bailor, the bailee is answerable. It is an obligation which arises *ex mandato*. It is what we call in English, acting by commission. And if a man acts by commission for another gratis, and in the executing his commission behaves himself negligently, he is answerable; and the reasons are, first, because in such a case a neglect is a deceit to the bailor, for when he entrusts the bailee, upon his undertaking to be careful, he has put a fraud upon the plaintiff by being negligent, his pretence of care being the persuasion that induced the plaintiff to trust him. And a breach of such a trust, undertaken voluntarily, will be a good ground for an action. A strong case to this matter was an action against a man who had undertaken to keep an hundred sheep, for letting them be drowned by his default. And there the reason of the judgment is given: because, when the party has taken upon him to keep the sheep, and after suffers them to perish by his default, inasmuch as he has taken them, and has them in his custody, if after he does not look to them, an action lies. And if a man will enter upon the thing, and take the trust upon himself, and miscarries in the performance of the trust, an action will lie against him for that; though nobody could have compelled him to do the thing" (t).

(s) *Healing v. Cathrell*, 25 Law, T. R. 7. 1 Smith's L. C. 161. *Doorman v. Jenkins*, 2 Ad. & E. 282.

(t) *Coggs v. Bernard*, Ld. Raym. 909;

Where a bystander was asked by the owner of a horse to get on the horse and ride it, for the purpose of showing it off for sale, and the bystander recklessly and carelessly rode the horse over very slippery and dangerous ground, and threw it down and injured it, it was held that he was responsible for the injury (u).

Loss of chattels by workmen to whom they have been delivered to be mended or repaired for hire.—Every bailee for hire of a chattel is bound to take the same care of the chattel, whilst it remains in his possession, that a prudent and cautious man ordinarily takes of his own property. If clothes are delivered to a fuller to be dressed, and he suffers them to be eaten by mice, he will be responsible for the damage, unless he can discharge himself from all imputation of neglect, by showing that he had been subjected to some unusual and unexpected visitation from such vermin. The very occurrence of the disaster affords a strong *prima facie* presumption of a want of ordinary caution (x). Where a ship, bailed to a shipwright to be repaired, was put into a dry dock belonging to the shipwright, and whilst she lay there a high tide arose, and pressed against the dock gates; and it appeared that the gates might have been shored up so as to resist the pressure of the water, but nothing was done, and the water at last burst open the gates and forced the bailor's vessel against another vessel; it was held that the bailee was responsible for the injury, as he might, by proper precautions, have guarded against the accident (y). Wherever the loss of the thing bailed arises from the want of the degree of care which, from the nature of the bailment, ought to be exercised, it is immaterial whether the negligence be imputable personally to the bailee or to the servants employed by him (z).

Theft by the servants of the bailee.—If the subject-matter of the bailment is secretly purloined by the bailee's servant, the bailee will be responsible for the loss, unless he can show that he could not, by the exercise of the greatest vigilance, have guarded against the theft; but he will not be responsible for a robbery by irresistible violence (a). Where a chronometer, bailed to a watchmaker to be repaired for hire, was placed by the bailee in a drawer in his shop amongst a variety of common watches, part of which belonged to the bailee, and the rest to his customers, which drawer was locked at night, and in a recess in the same room stood a strong iron chest, in which watches belonging to the

(u) *Wilson v. Brett*, 11 M. & W. 113.

(x) In the Roman law proof of such a disaster was held to be proof of negligence. "Si fullo vestimenta polienda acceperit; eaque mures roserint, ex locato tenebitur quia debuit ab hac re cavere. . . . Poterat ea res in locum tutiorem transferre."—Dig. lib. 10,

tit. 2, lex. 13, s. 5.

(y) *Leck v. Maestaer*, 1 Campb. 137.

(z) *Ld. Campbell, Dansey v. Richardson*, 3 Ell. & Bl. 169; 23 Law, J., Q. B. 228.

(a) *Walker v. British Guar. Ass.*, 21 Law, J., Q. B. 260; 18 Q. B. 277.

watchmaker, of the value of several thousand pounds, were deposited and locked up, and in the night the drawer was broken open by the watchmaker's servant, who slept in the shop, and the chronometer was stolen by him, together with the other watches there deposited, but the watches in the iron chest remained untouched; it was held, that as the watchmaker had taken more care of his own watches, by locking them up in the iron safe, than he had taken of the bailor's chronometer, he was responsible for the loss, and Dallas, C. J., was of opinion that the watchmaker "was bound to protect the property against depredation from those who were within the house" (b).

Of the negligent keeping of goods by warehousemen, wharfingers, and depositaries for hire—Thefts by servants.—All persons to whom goods and chattels are delivered to be kept for hire and reward, and who are paid expressly and specifically for the exercise of their labour and care in keeping them, and not merely for the finding of a place of deposit, are bound to exercise that amount of care and vigilance for their preservation, which the most prudent and careful of men exercise for the protection of their own property (c). If the goods are greatly injured by mice or rats, the warehouseman will be responsible for the damage (d), although he keeps cats to destroy vermin (e). It is no answer to an action against a warehouseman for the non-delivery of a chattel intrusted to him to keep for hire, to say that he has lost it (f); the mere fact of the loss is *prima facie* proof of negligence, and he must rebut this presumption by showing that he had taken the greatest care of the thing entrusted to him, and had no means of preventing the loss. A booking-office keeper who receives money for booking parcels, is bound to put them into a safe place, and if he leaves them in a public room, or an open shop, and they are lost or stolen, he will be responsible to the owner (g).

Of the distinction between robbery and theft.—A very sensible distinction is taken in the civil law between a public palpable robbery by force and violence, when a house is broken into and rifled of its contents, and a theft or secret purloining of goods. In the one case, the bailee relieved himself from responsibility for the loss by proof of the mere fact of the robbery (h); (it being considered that individual care or vigilance could avail but little against the open attack of the determined robber;) in the other, he was bound to make good the loss, unless he could show that he had taken the

(b) *Clarke v. Earnshaw*, Gow. 30.

(c) "Quod si horrearius nominatim custodiam mercium in se recepit, videbitur locasse operas non solum exactæ, sed etiam exactissimæ custodiæ."—Pandect. Just. ed. Poth. lib. 19, tit. 2, art. 3, 72.

(d) *White v. Humphrey*, 11 Q. B. 44.

(e) *Laveroni v. Drury*, 8 Exch. 166; 16 Jur. 1024.

(f) *Cairns v. Robins*, 8 M. & W. 258. *Reeve v. Palmer*, 5 C. B., N. S. 84.

(g) *Dover v. Mills*, 5 C. & P. 175.

(h) Dig. lib. 17, tit. 2, lex. 52, 53. Instit. lib. 3, tit. 15, s. 2, 3.

greatest care of the thing intrusted to him, and that it had been purloined, notwithstanding every precaution for its safety (i). Where an officer in the army, on leaving London, delivered a trunk containing divers articles of value to an upholsterer to be kept for a shilling a week, and the trunk was returned to the officer emptied of its contents, which were supposed to have been stolen by the upholsterer's servant, it was held by Lord Kenyon, that if the upholsterer had taken as much care of the articles as he had taken of his own property, he was not responsible for the theft committed by his servant (k), but every depositary of chattels to be kept for hire is *prima facie* responsible for a theft committed by his own servants within the house (l), and can only discharge himself from liability by showing that the theft was committed under such circumstances, or was of such a nature, that the greatest care and vigilance on his part could not have guarded against it, or prevented it.

Losses occasioned by the negligence of the bailor.—If the owner himself in any way conduces to the loss; if he brings people to the warehouse or place of deposit to look at the goods, opens packages in which they are contained, and the loss is as likely to have arisen from the misconduct of the persons so introduced, or from the carelessness of the owner, as from the neglect of the warehouseman or bailee, the latter is not responsible for the loss. Thus, where a quantity of ginseng contained in a box was deposited by the plaintiff in the defendant's warehouse, and the plaintiff was in the habit of resorting to the box, and ordering the lid to be taken off, for the purpose of showing the ginseng to expected purchasers, who came to the warehouse to view it on the invitation of the plaintiff, and rats at last got into the box and destroyed the ginseng; it was held that the defendant, the warehouseman, was not responsible for the loss (m).

Loss of chattels by wharfingers.—The duties and responsibilities of the wharfinger, in respect of the safe keeping of the goods entrusted to him, to be dealt with in the way of his trade, are analogous to those of the warehouseman. If he receives directions to ship them on board a particular vessel, he does not discharge his duty by delivering them to one of the crew; but he is bound to place them in the hands of the captain, or some person in authority on board the vessel (n). If he is clothed

(i) "Ad casus autem fortuitos non sunt referendi illi casus, qui cum culpa conjuncti esse solent; cujusmodi sunt furta. Quamobrem, qui rem furto amissam dicit, is diligentiam suam probare debet." Vin. Com. ad Instit. lib. 3, tit. 15, s. 5. Pothier (Pret a Usage), art. 53. Abbott, C. J., Ry. & Mood. 276.

(k) *Finucane v. Small*, 1 Esp. 315.

(l) *Hodgson v. Fullarton*, 4 Taunt.

787. *Dallas, C. J., Gow. 32. Campbell, C. J., & Coleridge, J., 3 Ell. & Bl. 150-171; 23 Law, J., Q. B. 223-229. De Rothschild v. Royal Mail, &c. Co., 7 Exch. 734; 21 Law, J., Exch. 273.*

(m) *Cailiff v. Danvers*, 1 Peake, N. P. C. 155.

(n) *Leigh v. Smith*, 1 C. & P. 638, 641; 2 Esp. 695.

merely with the custody of the goods, and the duty of shipping them devolves, by usage and custom, upon the master of the vessel to which they are to be sent, the wharfinger is discharged from responsibility as soon as he has placed them at the disposal, and under the care of the masters and officers of such vessel, although they are not actually removed from the wharf (o).

Loss of cattle—Liabilities of agisters of cattle.—A person who receives cattle or horses, or living animals to keep for the owner, and is paid expressly for his care and watchfulness in preserving them, as well as for their sustenance, is bound to take the utmost care of them, and he is responsible for damage and injury resulting from ordinary casualties, if such damage might have been averted and prevented by the exercise of great care and vigilance. Very slight evidence of neglect has been sufficient to induce juries to return verdicts in favour of those who have sought compensation for the loss of cattle delivered to bailees to be kept for hire. Thus, where the defendant, a farmer, had received the plaintiff's horse to agist for a certain price, and the horse strayed and was lost, and never after heard of, and the plaintiff gave evidence of the gates having been occasionally seen left open, and the fences being in parts out of order, but it did not appear that the horse had strayed through any defect in the fences, or through any of the gates having been left open, the jury, nevertheless, returned a verdict against the defendant for the full value of the horse (p). If the bailee suffers his fences to be defective, or puts the horse into a dangerous pasture, and the animal, by reason thereof, is lost or injured, this is a degree of neglect for which he is undoubtedly responsible (q).

Loss of goods by parties who have received them to be carried, but who do not exercise the publick employment of common carriers.—"Every man," observes Gould, J., "that undertakes to carry goods is liable to an action, be he a common carrier, or whatever he is, if through his neglect they are lost or come to any damage; and if a reward be given, then it is without question so. The reason of the action is the particular trust reposed in the bailee, to which he has concurred by the assumption of the work, and in the executing which he has miscarried by his neglect. And when a man undertakes specially to do such a thing, it is not hard to charge him for his neglect, because he has the goods committed to his custody upon those terms" (r). The law casts upon him the obligation of using due and proper care and skill, whether any hire or reward has or has not been agreed to be paid. If, therefore, a person receives a free pass, and is

(o) *Cobban v. Dourne*, 5 Esp. 41; *Story's Bailments*, 293; *Sir Wm. Jones*, 97.

(p) *Broadwater v. Blot*, Holt, 547.

(q) *Mosley v. Fosset*, 1 Roll. Abr. 4.

(r) *Coggs v. Bernard*, Ld. Raym. 909; 1 Smith's L. C. 148.

carried gratuitously upon a railway, the railway company is not thereby released from the duty of using due and proper care in the performance of the work of carrying him.

When a bailee has undertaken to carry money, or goods and chattels, gratuitously to a distant part, it is no answer to an action brought against him for the breach of his engagement to say that he lost the articles in a brothel or a lodging-house, or by the way-side, without giving any satisfactory or excusable account of the loss. The loss itself unexplained affords the strongest presumption of negligence (*s*), and the bailee must rebut this presumption by showing that he was forcibly robbed, or that the property was stolen without any gross neglect or wilful default on his part (*t*), or that his vehicle broke down or was overturned, and that the articles were lost during the hurry and confusion and fright of an undoubted accident. Where the bailee of a parcel upon which the word "value" was written promised to carry it gratuitously from Bedford to London, and directions were given to him to take particular care of it upon the road, and deliver it to the book-keeper at the Bell and Crown, Holborn, and the parcel not being delivered, an action was brought against the bailee for the breach of his engagement, and no satisfactory evidence was offered by him to excuse or account for his neglect, it was held that the bailee was responsible for the value of the parcel (*u*).

Where the captain of a vessel was intrusted with a seaman's chest to be carried gratuitously from Trinidad to England, and during the voyage the chest was opened to see if it contained any contraband articles, and was found to be filled with money and valuables, which were taken out by order of the captain, put into a canvas bag, and deposited in the captain's own chest in his cabin, where his own money and valuables were kept, and on the arrival of the vessel at Gravesend, the captain and one of the mates went ashore, leaving the vessel in charge of the other mate, and the next morning the captain's chest was missing, and was never afterwards discovered, and it appeared that the night preceding the loss of the chest an excise officer and two young men belonging to the ship had been allowed to sleep in the captain's cabin, Lord Ellenborough left it to the jury to say whether the captain had been guilty of negligence, telling them that as soon as he had discovered the valuable nature of the property, he was bound to watch it with great care and diligence, and the jury being of the opinion that proper care had not been taken of the money, found a verdict for the plaintiff for the full value of the property (*v*).

(*s*) *Parry v. Roberts*, 3 Ad. & E. 120;
5 N. & M. 670; Maule, J., 6 C. B. 456.

(*t*) *Doorman v. Jenkins*, 2 Ad. & E. 256;
Holt, C. J., 2 Raym. 913.

(*u*) *Beauchamp v. Powley*, 1 M. & Rob.
38.

(*v*) *Nelson v. Mackintosh*, 1 Stark. 237.

When the bailee is to be paid for carrying the things, he cannot, of course, in any case, set up a mere loss of goods by the way, as an answer to an action for the non-delivery of them (x). But the duty to carry safely, which the law imposes upon all persons who undertake the carriage of goods for hire, is not understood to mean that the goods shall be carried and delivered safe at all events, but that they shall be kept safe from all such hazards and contingencies as might have been foreseen and guarded against by the exercise of vigilance and skill.

Where the defendant received eleven boxes of gold dust, to be carried and delivered at the Bank of England, "robbers and dangers of the road excepted," and one of the boxes was secretly stolen, it was held that the defendant was responsible for the loss; that a secret theft or pilfering was not within the exception as to robbers, nor was it a danger of the road within the meaning of the contract (y). If the owner accompanies the goods to take care of them, and loses them himself, the carrier is not, of course, responsible for the loss (z). But if the goods are actually bailed or delivered into the hands of the carrier, the latter cannot exonerate himself from the consequences of negligent keeping by showing that the owner sent his own servant with the goods for greater security (a).

Limitation of the liability of shipowners in respect of the carriage of merchandize and chattels on the high seas.—The Merchant-Shipping Act (17 & 18 Vict. c. 104, part ix.), s. 503, exempts the owners and shareholders of sea-going ships from liability to make good any loss or damage that may happen, without their actual fault or privity, to any goods, merchandize, or things from FIRE on board ship, or to any gold, silver, diamonds, watches, jewels, or precious stones, by reason of robbery or embezzlement, making away with or secreting thereof, unless the owner or shipper thereof has, at the time of shipping the same, inserted in his bills of lading, or otherwise declared in writing to the master or owner of such ship, the true nature and value of such articles.

Of the detaining of chattels by bailees under a claim of lien.—The detention of chattels by a bailee is frequently justified on the ground that the bailee has a right to hold them in his hands until some pecuniary demand upon or in respect of them has been satisfied by the bailor. A right of lien may exist in favour of the unpaid vendor of chattels, who has not parted with the possession of the things he has sold; or in favour of parties who have advanced money upon the security of a deposit of title-

(x) *Rogers v. Head*, Cro. Jac. 262.
Matthews v. Hopping, 1 Keb. 852. *Ross v. Hill*, 2 C. B. 877; 15 Law, J., C. P. 182.
 (y) *De Rothschild v. R. M. St. P. Co.*,

7 Exch. 734; 21 Law, J., Ex. 273.

(z) *Brind v. Dale*, 8 C. & P. 209, 211; 2 M. & Rob. 80.

(a) *Robinson v. Dunmore*, 2 B. & P. 416.

deeds, or of goods and chattels; of innkeepers who have provided lodging and food for travellers and guests; of common carriers who have received goods to be carried for hire; of shipowners who have earned freight for the conveyance of a cargo, or the hire of their vessels under a charter-party of affreightment, when the ship itself has not been demised to the charterer, or who have a claim against the owners of goods for general average or salvage (*b*); of the salvor or rescuer of property from perils of the sea, who has earned salvage for his services; of the factor, broker, or auctioneer, who has received goods for sale, and has made advances or given acceptances upon the credit of them to his employer, or who has sold them and earned commission, &c., and retains in his hands the produce of the sale. It generally exists, also, in favour of artisans and others who have bestowed labour and service on goods and chattels which have been delivered to them to be repaired, improved, or mended. It may exist also in many other cases by custom, or by the express agreement of the parties (*c*).

The right of lien, when once established, is not destroyed by reason of the remedy for the recovery of a debt secured by the lien being barred by the statute of limitations (*d*).

Particular liens and general liens.—There are two species of liens known to the law, namely, particular liens and general liens. Particular liens are where persons claim a right to retain goods in respect of labour and money expended upon them, and those liens are favoured in law. General liens are claimed in respect of a general balance of accounts, and these are founded in custom only, and are therefore to be taken strictly.

Of the ordinary lien of workmen and artificers.—Whenever a party has bestowed work and labour or skill in repairing or improving a chattel at the request, or by the employment of the owner, he has a lien upon it for a fair and reasonable remuneration, or for the contract price, if a price has been fixed by agreement (*e*). Thus the artificer to whom goods are delivered to be worked up in form for hire, the shipwright to whom a vessel has been delivered to be repaired (*f*), the printer to whom paper has been delivered to be printed (*g*), the miller who has ground corn or meal at his mill (*h*), the horsebreaker or trainer by whose skill a horse is trained and rendered manageable (*i*), the stallion-keeper who has received a mare to be covered by his stallion, have each a lien for their hire, or the customary

(*b*) *Briggs v. Mercht. Trad. &c.*, 18 Law, J., Q. B. 178.

(*c*) *Small v. Montez*, 9 Bing. 574.
Norris v. Williams, 1 Cr. & M. 842.
Hague v. Dandeson, 17 Law, J., Exch. 280.

(*d*) *Spears v. Hartly*, 3 Esp. 81. *Re Broomhead*, 16 Law, J., Q. B. 355.

(*e*) *Chase v. Westmore*, 5 M. & S. 183.

(*f*) *Franklin v. Hosier*, 4 B. & Ald. 341.

(*g*) *Blake v. Nicholson*, 3 M. & S. 167.

(*h*) *Chase v. Westmore*, 5 M. & S. 180.

(*i*) *Beran v. Waters*, 3 C. & P. 520.
Jacobs v. Latour, 2 M. & P. 201; 5 Bing. 130. *Scurfe v. Morgan*, 4 M. & W. 284.

charges for their services, unless there be some express or tacit understanding between the parties to the particular contract inconsistent with the exercise of such a right. But where no work is to be done upon the chattel to improve or increase its value, or carry it from one place to another for hire, no lien attaches upon it. Thus, if a power of attorney, or an authority to receive money, is intrusted to a bailee in order that he may exhibit it as a voucher, he has no lien upon the document for money due to him from the bailor. When a mortgage-deed was delivered to an auctioneer in order that he might obtain payment of the principal and interest due thereon, and the auctioneer made several applications for the money, it was held that he had no lien upon the deed for his charges (*k*). The lien of the manufacturer and workman extends only to the principal chattels placed in his hands to be worked up, and not to the accessorial materials which may have been furnished by the employer, and left upon the premises of the manufacturer or workman unused. Thus, when oil, madder, dyewood, and fustic, were furnished to scribblers and fullers by a party who sent them cloth to be scribbled and fulled and dyed upon their premises, it was held that the lien of the scribblers and fullers was confined to the cloth, and did not extend to the oil, &c., furnished by the employers, and left upon the premises after the scribbling and fulling had been completed (*l*). And where a stereotype printer received stereotype plates from his employer to print from, it was held that his lien for printing was confined to the paper, and did not extend to the plates from which he printed. But such a lien may be established by custom and usage of trade, or by agreement of the parties (*m*). The lien of the artificer upon a chattel is strictly confined to work done upon it in making, mending, or repairing it. He cannot set up any claim against the owner for expenses incurred by him for warehousing it and taking care of it during the period of its detention (*n*).

A party cannot set up a right of lien which is at variance with the terms or conditions, or implied understanding, upon which he received the property. Thus, if a livery-stable keeper takes in a horse to be stabled and fed for hire, upon the understanding that the horse is to be re-delivered to the owner whenever he requires it, the livery-stable keeper has no right of lien upon the horse for his keep (*o*), or for money paid by him to a veterinary surgeon for blistering the horse according to the owner's directions (*p*), the rights of the owner to the possession of the horse for the purpose of riding him being deemed inconsistent with the

(*k*) *Sanderson v. Bell*, 2 Cr. & M. 304.

(*l*) *Cumpston v. Haigh*, 2 Sc. 684.

(*m*) *Bleaden v. Hancock*, 1 M. & M. 465.

(*n*) *Brit. Emp. Ship Co. v. Somes*, 27

Law, J., Q. B. 397.

(*o*) *Judson v. Etheridge*, 1 C. & M. 743.

Yorke v. Grenaugh, 2 Ld. Raym. 808.

(*p*) *Orchard v. Rackstraw*, 19 Law, J., C. P. 303.

right of lien. The livery-stable keeper, indeed, who holds a horse at the constant disposal of the owner, is the mere servant of the latter, and has nothing more than the bare custody of the animal. This is the case also with the agister of milch cows, who receives them to be depastured, agisted, or fed, the owner having a right to the possession of the cows whenever he requizes them for the purpose of milking (*q*). And if a trainer of race-horses holds them on the understanding that the owner may send them to be ridden by a jockey of his own choice at any race he chooses, and the trainer cannot lawfully refuse to deliver them to the owner for such a purpose, that state of things is inconsistent with the existence of a right of lien (*r*). If a policy of insurance is deposited for safe custody only, the depositary cannot set up a lien upon it for an antecedent debt (*s*). If a party receives a bill of exchange to get it discounted, and pay over the proceeds to the owner, or apply them in some specified manner, he has no lien upon the bill for money that may be due to him from the latter (*t*). If a ship-factor receives the certificate of registry of a ship in order to pay the tonnage dues, he has no lien upon it for a debt due to him from the shipowner (*u*). Whenever goods in the hands of a bailee or depositary are by the terms of the contract to be redelivered to the owner at some stated period, or "if by the agreement the plaintiff is to have the goods immediately, and the payment in respect of them is to take place at a future day, the bailee cannot set up any lien" (*x*). A lien is wholly inconsistent with a dealing on credit, and can only exist where payment is to be made in ready money, or security is to be given the moment the work is completed (*y*). "If security" (such as a bill, note, or bond) "is taken for the debt for which the party has a lien upon the property of the debtor, such security being payable at a distant day, the lien is gone" (*z*).

If a party, when goods are demanded of him, rests his refusal to deliver them up on grounds quite distinct from any claim of lien, he cannot afterwards, on finding that those grounds fail him, put forward a claim of lien as a justification for his refusal. Where, therefore, a warehouseman, on being applied to for brandy which had been delivered to him for safe custody, refused to give it up, saying that it was his own property, it was held that he could not afterwards justify his refusal on the ground that warehouse rent was due to him, and was not tendered at

(*q*) *Jackson v. Cummins*, 5 M. & W. 342. *Chapman v. Allen*, Cro. Car. 273.

(*r*) *Forth v. Simpson*, 18 Q. B. 685.

(*s*) *Muir v. Fleming*, D. & R., N. P. C. 30.

(*t*) *Key v. Flint*, 8 Taunt. 23; 1 Moore, 451. *Buchanan v. Findlay*, 9 B. & C. 749.

(*u*) *Burn v. Brown*, 2 Stark. 273.

(*x*) *Crawshay v. Homfray*, 4 B. & Ald. 52.

(*y*) *Raitt v. Mitchell*, 4 Campb. 146.

(*z*) *Hewison v. Guthrie*, 3 Sc. 298; 2 Bing. N. C. 759. *Cowell v. Simpson*, 16 Ves. 280. *Horncastle v. Farran*, 3 B. & Ald. 497.

the time the brandy was demanded (a), "for it would be absurd to offer the expenses of keeping the goods to one who insisted on retaining them as his own property" (b). But a person does not, of course, lose his right of lien by merely omitting to mention it when the goods are demanded. And if he claims a right to retain them for two separate charges, and has a lien only in respect of one of them, this will not dispense with the necessity of a tender of the one in respect of which the lien exists (c).

Of the parties entitled to create a right of lien.—A mere trespasser or wrong-doer, who gets possession of property without the consent of the owner, cannot in general deal with it so as to create a right of lien thereon as against the true owner (d), unless the party in whose possession the property is placed is a publick innkeeper, or common carrier, or common ferryman, or is bound to exercise his craft in favour of all who require his services (post, ch. 9). Where the owner of a pony phaeton intrusted the phaeton to a painter to be painted, and the latter carried it to the premises of the defendant, who was in the habit of taking carriages to stand on his premises for hire, and there left it, and the phaeton, never having been painted or brought back, the plaintiff, after the expiration of three months, made search for it, and found it on the premises of the defendant, who claimed a lien on it for the price of the standing-room, it was held that the defendant had no such lien (e). And when a chaise, which had been broken by the negligence of a servant, was taken by the latter to a coachmaker's, without the knowledge or sanction of the master, and was there repaired, it was held that the coachmaker had no lien upon the chaise as against the master for the price of the repairs (f). It would seem also, from the adjudged cases, that if a servant is directed to take a carriage to A to be repaired, and he by mistake takes it to B, that B would have no lien upon it for the price of the repairs, as the servant was not authorized to employ B in the matter. This may be law, but it is hardly just, and opens a wide door to fraud, as it is impossible for the coachmaker to be cognizant of the particular directions given by the master to the servant. If the servant has received general directions to get the carriage repaired, he may then of course give a right of lien to any coachmaker he may employ to do the repairs (g). It has been held, that if a person obtains possession of goods by fraud, and pawns them, the pawnee is entitled to a lien upon them for the money advanced as against the true owner (h). But the possession of the goods by the

(a) *Boardman v. Sill*, 1 Campb. 410 n.

(b) *White v. Gainer*, 9 Moore, 45.

(c) *Scarfe v. Morgan*, 4 M. & W. 281.

(d) *Hartop v. Hoare*, 3 Atk. 44. *Lempriere v. Pasley*, 2 T. R. 485.

(e) *Buxton v. Baughan*, 6 C. & P. 674.

(f) *Hiscox v. Greenwood*, 4 Esp. 174.

(g) *Weldon v. Gould*, 3 Esp. 268.

(h) *Parker v. Patrick*, 5 T. R. 175; doubted *Peer v. Humphrey*, 2 Ad. & E. 499; said to be good law by Parke, B., 16 M. & W. 219; and *Creswell, J.*, 20 Law, J., C. P. 168.

pawnor must have been obtained by virtue of a contract intended to pass the property to him. If a person pawns with another property, to which he has no colour of title, the *jus tertii* may always be set up against the pawnor by the pawnee (i).

General lien is a right on the part of a manufacturer, or workman, factor, broker, or commission agent for the sale of goods, warehouseman, or wharfinger, into whose hands goods have been placed to be worked up, repaired, or improved, sold, or taken care of for hire, in the ordinary course of their trade or employment, to retain possession of them, not only until they have received payment of the hire due to them for their services in the particular employment, but for the general balance due to them from their employer in the ordinary course of dealing for work and services of the like nature bestowed at other times upon other goods of the employer. This right depends either upon the express agreement of the parties, or the custom and usage of the particular trade or business. The onus of making out and establishing the right, whether it exists by agreement or by custom, lies upon the party claiming it. When custom and usage of trade are relied upon as establishing the right, the usage must be shown to have governed the parties in their previous dealings together, or to prevail to such an extent that the contracting party must be supposed cognizant of it, and to have contracted subject to the usage, but as the right is an encroachment upon the ordinary rules and principles of the common law, it is regarded with jealousy by the courts, and requires the strongest proof.

A general lien cannot be set up in opposition to the terms and conditions upon which the goods were received. Thus, if a broker or factor receives goods to sell, and applies the proceeds in some particular manner, he cannot set up a lien for his general balance, because a lien of this nature would be utterly inconsistent with the terms upon which he acquired possession of the goods (k). And if a debtor deposits a bill of exchange with his creditor, in order that the latter may get the bill discounted, and pay over the proceeds to the debtor, the creditor cannot set up a lien upon the bill for the general balance due to him (l). In some places, dyers, calico-printers, fullers, warehousemen, wharfingers, and packers, have been held, in accordance with the proved usage of their several trades in the particular locality, to have a lien on goods sent to them to be dyed, printed, warehoused, worked upon, or taken care of, not only for the work done upon, or in respect of the particular goods in their possession, but also for their charges of dyeing, printing, warehousing, &c.

(i) *Cheesman v. Exall*, 6 Exch. 345.
As to pledges by Factors and Agents, see
Addison on Contracts, p. 319, 4th edit.

(k) *Walker v. Birch*, 6 T. R. 262.
(l) *Key v. Flint*, 1 Moore, 451; 8
Taunt. 21.

other goods which had previously been delivered back to their owners (*m*); and in other places where no such usage has been shown to exist, they have been held to have no such general lien (*n*). The usage, when it exists, must be shown to be long established, and notorious, fair and reasonable, and not contrary to any established principle of law (*o*). It has been held that a publisher has a lien upon any one or more parts or numbers of a work for his charges and disbursements for printing or publishing the various numbers, though not consecutive, of an entire work (*p*), also that an agent who carries on business, in his own name on behalf of an undisclosed principal, has a lien on the business, the stock employed in it, and the debts owing to it, to the extent of the liability which he has incurred in the conduct and management of the business (*q*).

Lien of factors and brokers.—Factors and brokers to whom goods are consigned to be sold, have a lien for the general balance due to them from their employers or principals in the ordinary course of their business as factors, and for their acceptances on behalf of such employers upon the goods whilst they are in their possession, and on the monies realised by the sale of them (*r*). This right exists universally by the custom of the trade. It is part of the law merchant, and as such is judicially taken notice of by the courts, no proof being ever required as a matter of fact that such general lien exists. The lien does not extend to a collateral debt not growing out of the relationship of principal and factor, such as a debt due for rent (*s*), nor to goods which have not actually reached the hands of the factor (*t*), and come into his possession with the consent and direction of the owner; consequently, if goods have been left at the factor's place of business by mistake or inadvertence (*u*), or have been taken possession of by him without the authority of the owner, he cannot set up a lien upon them for his balance (*x*). And if the party from whom he receives the goods is only an agent, he cannot retain them as against the true owner for a debt that was due to him from the agent at the time the goods were put into his hands, and which was not contracted on the credit of the deposit of the goods; but it is otherwise if he has made advances on the credit of the deposit, not knowing the depositor to be an

(*m*) *Savill v. Barchard*, 4 Esp. 52.
Naylor v. Mangles, 1 ib. 109. *Spears v. Hartly*, 3 ib. 81. *Rose v. Hart*, 8 Taunt. 499; 2 Moore, 547. *Webb v. Fox*, 2 Peake, N. P. C. 167.

(*n*) *Green v. Farmer*, 4 Burr. 2214; 1 W. Bl. 651. *Holderness v. Collinson*, 7 B. & C. 216.

(*o*) *Rushforth v. Hadfield*, 6 East, 528.
Leuckart v. Cooper, 3 Sc. 521; 3 Bing. N. C. 99.

(*p*) *Blake v. Nicholson*, 3 M. & S. 167.

(*q*) *Foxcraft v. Wood*, 4 Russ. 488.

(*r*) *Kruger v. Wilcox*, Ambl. 252. *Hudson v. Granger*, 5 B. & Ald. 31. *Hammond v. Barclay*, 2 East, 227.

(*s*) *Houghton v. Matthews*, 3 B. & P. 485.

(*t*) *Kinloch v. Craig*, 3 T. R. 123.

(*u*) *Lucas v. Dorrien*, 7 Taunt. 278.

(*x*) *Taylor v. Robinson*, 2 Moore, 730.

agent (y). The factor can only claim a lien for his general balance upon goods which come to his hands as factor. A factor, therefore, who effects a policy of insurance, not as factor but as an insurance broker, is not entitled to a general lien on a policy in his hands for a balance due to him in his character of factor (z):

Lien of insurance brokers.—Insurance brokers have also, by the general usage and custom of trade, a lien for the general balance due to them from their employers upon all policies effected by them for such employers, and left in their hands, and upon all monies received by them upon such policies from the underwriters, unless the party for whom they effected the policy was himself only an agent in the matter; in which case the extent of their lien will depend upon the disclosure or concealment of the agency, and the degree of credit they may have given to the agent, under the impression that he was the party really interested in the policy. The lien does not extend to a collateral debt not incurred in respect of brokerage business.

Lien of bankers.—Bankers also, who are a species of factors in pecuniary transactions, have, by the general law of the land, a lien upon all the securities of their customers in their hands for their advances to such customers in the ordinary course of business (a), unless such securities have been received under special circumstances, and not in the ordinary way of their business as bankers, or under some special arrangement or understanding inconsistent with the exercise of the right, or limiting it to some specified amount (b). If title-deeds and securities for money, not being negotiable, are deposited in the hands of a banker by a person who is wrongfully possessed of them, or is not the true owner thereof, and is not authorized to raise money upon them, the banker has no better or further rights over them than the party who deposited them in his hands, and cannot set up a lien upon them as against the true owner (c). But as regards negotiable securities, such as exchequer bills, bills of exchange, and promissory notes, the right of general lien will extend to them, although the customer who delivered them to the banker was not the owner, but was holding them as an agent or trustee of some third party, unless the banker knew at the time he received the securities that they did not belong to the party from whom he received them. The lien of a banker upon the securities in his hands belonging to his customers is part of the law merchant, and as such is judicially taken notice of by the courts (d).

(y) *Pullney v. Keymer*, 3 Esp. 181.

(z) *Dixon v. Stansfeld*, 10 C. B. 398.

(a) *Davis v. Bowsher*, 5 T. R. 488.

(b) *Vanderzee v. Willis*, 3 Bro. C. C. 21.

(c) *Lucas v. Dorrien*, 7 Taunt. 278.

(d) *Barnett v. Brandao*, 7 Sc. N. R. 331.

Wookey v. Pole, 4 B. and Ald. 11. *Collins v. Martin*, 1 B. & P. 648.

Lien of attorneys and solicitors.—Attorneys and solicitors also have a lien upon all money recovered by them in the actions and suits in which they are employed, and upon all the deeds and papers, and other articles of their clients which come to their hands in their professional capacity, for the purposes of business, for the costs not only of the particular cause or matter with which such deeds or papers are connected, but for the costs due to them generally from their clients (*e*). But a solicitor has no lien upon the will of a client for the costs incurred in the preparation of it, and cannot therefore refuse to produce it after his client's death until his costs have been paid. And where deeds are delivered for a specific purpose, the right of lien is extinguished as soon as the particular purpose has been accomplished, and it may be superseded altogether by the attorney's taking from the client security for his costs (*f*). The town agent of a country attorney has a lien only upon the money recovered, and upon the papers in his hands in the particular cause in which he is engaged, for the amount due to him by the attorney in that particular cause. He cannot set up a claim of lien for the general balance due to him from the country attorney who employs him, and cannot retain the money or papers of the client to satisfy his general debt (*g*).

An attorney cannot set up a general lien for the balance due to him in respect of services not rendered by him as an attorney, nor can he detain deeds and papers which do not come to him in his professional character. He has no lien, for example, where he acts or holds papers as town-clerk (*h*), or steward of a manor (*i*); he cannot set up any lien which is inconsistent with the nature of his employment, or the terms, or conditions, or express or implied trust upon which he received the papers (*k*). His right, moreover, is dependent upon the rights of his client, and he cannot acquire more extensive powers over the papers in his hands than the client himself possessed at the time he deposited them with him (*l*). If an attorney transacts business for a firm in partnership collectively, and also manages the private business of the members of the firm individually, he has no lien upon the private securities, deeds and writings of one partner in respect of the business done for the firm (*m*).

Certificated conveyancers have no lien upon the papers and instructions

(*e*) *Stevenson v. Blakelock*, 1 M. & S. 535. *Lambert v. Buckmaster*, 2 B. & C. 616. *Blunden v. Desert*, 2 Dru. & W. 405. *Friswell v. King*, 15 Sim. 191.

(*f*) *Genges v. Genges*, 18 Ves. 294. *Balch v. Symes*, Turn. & R. 92.

(*g*) *White v. R. Ex. Ass. Co.*, 7 Moore, 249. *Moody v. Spencer*, 2 D. & R. 6; Anon. 2 Dick. 802.

(*h*) *Champernown v. Scott*, 6 Mad. 93.

(*i*) *Rex v. Sankey*, 5 Ad. & E. 428.

(*k*) *Lawson v. Dickenson*, 8 Mod. 807.

(*l*) *Hollis v. Claridge*, 4 Taunt. 807. *Esdaile v. Ozenham*, 3 B. & C. 229. *Lightfoot v. Keane*, 1 M. & W. 745. *Molesworth v. Robbins*, 2 Jones & Lat. 358.

(*m*) *Turner v. Deane*, 3 Exch. 886; 18 Law J., Exch. 343.

placed in their hands for the purpose of enabling them to draw out a conveyance (n).

Lien of shipmasters.—An agent cannot acquire a lien upon the property of his principal for work done by others whom he has employed and paid. A shipmaster, therefore, has no lien upon a ship for money expended or debts incurred by him for repairs done to her on the voyage (o).

Notices that goods will be held subject to a general lien.—The right to retain for a general balance may, with certain exceptions presently noticed, be reserved by the express contract of the parties. Every workman and artificer not being a publick innkeeper, common carrier, common ferryman, common farrier or smith, and not being bound to exercise his calling in favour of all persons who may require his services, has a right to prescribe the terms upon which he will receive goods into his possession to be dealt with in the ordinary course of his trade, and may by express notice reserve to himself a general lien, if he thinks fit so to do. Thus, where the dyers, dressers, bleachers, whisters, printers, and calenderers of Manchester, and the neighbourhood, came to a public resolution or agreement, at a public meeting in Manchester, that they would receive goods to be dyed, dressed, bleached, &c., on the condition that such goods should not only be subject to the debts for the work and labour performed upon them, but also for the general balance due from the persons employing them for work and labour of the same kind performed upon goods, which they had already delivered out of their possession, it was held that parties who had sent goods to the dyer or fuller, with notice of this resolution, conceded to them a lien for their general balance (p).

General lien by custom of trade — Warehousekeepers — Wharfingers.—Where certain publick warehousekeepers of the city of London claimed a right to retain various bales of wool under an ancient custom of that city, for all publick warehousekeepers to have a general lien upon all goods from time to time housed in their warehouses in the name of the merchants or other persons by whom such publick warehousekeepers were employed, for all monies or any balance thereof due from such merchants to such publick warehousekeepers for their advances, expenses, and charges, &c., it was held that the custom was bad, as the general lien claimed was not confined to goods the property of the person who employed or retained the warehousekeeper. "The custom," it was observed, "if supportable, would make the goods of a foreign merchant, which have been consigned to a London

(n) *Steadman v. Hockley*, 15 M. & W. 559.

(o) *Hussey v. Christie*, 9 East. 433.

(p) *Kirkman v. Shawcross*, 6 T. R. 14.

factor for sale, and by him put into the warehouse of the warehouse-keeper for safe custody, liable to a private debt of the factor for expenses incurred in respect of other goods of third persons, which had been in his hands at former times, for charges contracted upon such goods during any antecedent period of time, and that to an unlimited extent; which would be unreasonable and unjust, and obviously prejudicial in a very high degree to foreign trade, for no foreign merchant would consign his goods to this country for sale, if they could be made liable whilst warehoused for custody, to satisfy a debt already due from the factor to the warehouse-keeper, in respect of other goods" (g). If a wharfinger has a general authority to receive all goods directed for A. B., and goods come to his wharf directed by mistake for A. B., the real owner of the goods cannot take them away without paying the charges incident to those particular goods; but it is equally clear that the wharfinger could not set up a lien on such goods for a general balance of accounts due from A. B. to him (r).

Lien of policy-brokers.—If a policy-broker is employed by an agent to effect a policy of insurance for the benefit of such agent, and there is no disclosure of the agency, and nothing to lead the broker to think that any third party is interested in the policy, and the insurance is accordingly effected in the name of the agent as owner, and a loss occurs, and the policy is allowed, after the loss, to remain in the broker's hands, and the latter then permits the agent to get into his debt, not knowing him to be an agent, the broker will have a lien as against the principal upon the policy, and upon the money he receives thereon from the underwriters, to the extent of the debt due to him from the agent, as well as for his commission, and charges for effecting the policy (s). But if there is the slightest indication of the agency to the broker, such as a declaration by a British subject in time of war that the property is neutral (t), or a statement that the insurance is to be effected "for a correspondent in the country" (u), or that the property to be insured belongs to a merchant abroad who has consigned it to the agent with full power of disposition over it, and with authority to indorse the bill of lading (x), the broker will have a lien only for his commission and charges for the insurance, and not for the balance due to him from the agent.

Of the extinguishment of the right of lien by abandonment of possession.—If a bailee who has a right of lien upon property in his possession, volun-

(g) *Tindal, C. J., Leuckart v. Cooper*, 3 Sc. 581; 3 Bing. N. C. 99; 35 Hen. 6, 33, cited *Rex v. Humphery*, 1 Mo. Clcl. & Y. 193.

(r) *Richardson v. Goss*, 3 B. & P. 123.

(s) *Mann v. Forrester*, 4 Campb. 61.

Westwood v. Bell, ib. 855. *Olive v. Smith*, 5 Taunt. 56.

(t) *Mauss v. Henderson*, 1 East, 337.

(u) *Snook v. Davidson*, 2 Campb. 218.

(x) *Lanyon v. Blanchard*, ib. 597.

rapidly parts with the possession of such property, the lien is gone; so that if he afterwards recovers possession of the property his right of lien does not revive (y); but if it is stolen or taken away by a trespasser or by fraud, and he gets it back again, his right of lien is not extinguished (z). Possession of goods and chattels may be given up, and the right of lien extinguished, although the goods and chattels are never actually removed from the premises of the party having the lien (a). And, on the other hand, as the possession of the servant is the possession of the master, it follows that a depositary or bailee who has a right of lien upon goods in his possession does not lose his right by placing the goods in the hands of his servant or agent for custody, who is to hold them at his disposal. Warehousekeepers and wharfingers to whom goods have been delivered by masters of ships for safe custody, have been held to be the servants of such masters holding the goods at their disposal, so as to preserve the shipmaster's lien for the freight after the goods have been taken out of the ship (b).

The right of lien being a mere personal right, which cannot be parted with, it follows that a bailee who has got a lien cannot sell his right to another, nor can he transfer, as we have just seen, the property over which the lien extends, to another, without losing his right of lien (c), unless the property has been pledged to secure the repayment of money advanced, with an express or implied power of sale. An innkeeper, consequently, cannot sell the horse of his guest for the expense of his keep, except within the city of London (d). A sheriff cannot sell an interest of this description, and he cannot, consequently, seize property covered by the lien under an execution against the party claiming the lien (e); but if the execution is against the owner of the goods, he is entitled then to seize them, after tendering the amount of the debt for which they are a security. A person may, as we have before seen, reserve to himself, by express contract, a right to take and to hold goods as a security for the payment of a debt, so that he will be entitled to resume possession of the goods after he has parted with them, and re-establish his lien, provided the rights of no third party have intervened.

Tender of the debt in extinguishment of the right of lien.—Wherever a person has a lien upon goods for the payment of money due upon them, whether he be an unpaid vendor in possession of goods sold, or a manufacturer or workman in possession of goods that have been worked up or repaired by him, or a pledgee holding chattels as a security for a

(y) *Sweet v. Pym*, 1 East, 4.

(z) *Wallace v. Woodgate*, R. & M. 194.

(a) *Jacob v. Latour*, 2 M. & P. 205.

(b) *Reeves v. Capper*, 5 Bing. N. C. 136.

(c) *Clerk v. Gilbert*, 2 Bing. N. C. 357.

(d) *Jones v. Pearle*, Str. 556.

(e) *Legg v. Evans*, 6 M. & W. 42.

debt, the lien may be at once extinguished, and a right to the possession of the goods created by a tender of the money due upon them (f). Where a lease was deposited with the defendants as a security for the repayment of 150*l.* on a promissory note payable on demand, and the defendants agreed that they would not enforce their remedy upon the note so long as the maker should duly pay the interest thereon, the rent of the premises, and what might from time to time be due to them for beer, and if he failed in any of these respects, the defendants were to be at liberty, after notice, to sell the lease and to deduct the expenses of the sale, the principal money and interest, and any account then due from the plaintiff to the defendant, it was held that the moment the amount of the note was paid or tendered, there was an end of all the stipulations as to what should be done with the lease in the event of the non-payment of the note and interest, and that the plaintiff had a right to maintain an action of detinue to recover back his lease (g).

Retention of goods and chattels, deeds and securities, by one of several joint-owners or tenants-in-common.—"If two be possessed of chattels personal in common by divers titles, as of a horse, an ox, or a cow, &c., if the one take the whole to himself out of the possession of the other, the other hath no other remedy but to take this from him who hath done to him the wrong, to occupy in common, &c., when he can see his time" (h). Where two have an equal interest in a deed and each may have occasion to use it, as for instance, where the same deed grants Whiteacre to A, and Blackacre to B, it is manifest that both cannot hold the deed at the same time; and to avoid any unseemly contest for the possession of it, it has been held that he who first gets hold of it is entitled to keep it. For fraud or force which may be used to get possession of the deed, either party may perhaps have a remedy against the other; but the title to the deed is ambulatory between those who may have an interest in, and may have occasion to use it, and each is entitled to keep the deed from the other so long only as he actually retains it in his custody and control, but no longer (i).

Re-delivery of chattels to one of several joint-bailors.—If an action is brought by several joint-bailors against a bailee for the non-delivery of goods deposited in his hands by a joint-bailment from all of them, it is a good defence to the action that the goods bailed by the plaintiffs to the defendant have been delivered up to one of them. "It is said," observes Lord Campbell, "that this is no defence, because the contract of bailment, was not to deliver them except to the plaintiffs jointly. But as, in fact,

(f) *Ratcliff v. Davies*, Cro. Jac. 244.(g) *Chilton v. Carrington*, 15 C. B. 105.

(h) Litt. sec. 323.

(i) *Foster v. Orab*, 12 C. B. 186.

one of the plaintiffs has got the goods, the question arises whether he can sue the defendants for giving them to himself. It would be contrary to all principle, and the cases show that it would be contrary to all law if he could. I do not think an action could be maintained against bankers in this position more than against others; but it is not to be supposed they could therefore with impunity deliver up to one person securities deposited with them to hold for several persons. I think, in such a case, they would stand in the relation of trustees for all the joint-bailees; and there would be a clear remedy in equity for the breach of trust in delivering the joint property to one only of the *cestui que trusts* " (k).

SECTION II.

OF ACTIONS FOR THE NEGLIGENT MANAGEMENT, NEGLIGENT KEEPING, AND UNLAWFUL DETAINING OF GOODS AND CHATTELS.

Parties to be made plaintiffs in actions against bailees.—A mere gratuitous bailment of a chattel to another does not, as we have seen, remove the chattel out of the possession of the bailor, and does not prevent the latter from suing a third party who takes the chattel out of the hands of the bailee and refuses to deliver it to the bailor on demand (*ante*, p. 222). In cases of gratuitous bailment, the bailee generally holds the chattels merely at the will of the bailor, and is bound to return them whenever required so to do. Where, therefore, brewers sell porter in casks, and lend the casks to their customers until they are emptied, they may maintain an action against a wrong-doer for taking and detaining the empty casks (l).

In all cases of bailment of chattels by one person to another for hire or reward, it is essential that the bailee should preserve his dominion and control over the property, and his power of restoring it to the owner. If therefore he parts with the possession of the chattel, and places it under the dominion and control of a stranger, the bailment is determined, and the owner has a right of action for the recovery of the thing bailed (m).

Where, after a bailment of chattels, the bailor has transferred all his interest in the chattels to another, the bailee is entitled, as we have seen,

(k) *Brandon v. Scott*, 7 Ell. & Bl. 237;
26 Law, J., Q. B. 163.

(l) *Manders v. Williams*, 4 Exch. 343.
(m) *Cooper v. Willomat*, 1 C. B. 682.

to have an order or authority from the bailor to deliver them to his transferee, or a reasonable time to make inquiry and ascertain the validity of the new title of the claimant before he can be made responsible in damages for the non-delivery of the chattels to the latter (*n*). Where, for example, goods have been bailed by the owner to a warehouse-keeper, to be kept, and the owner has subsequently sold the goods to a purchaser, the warehouse-keeper is not responsible for refusing to deliver the goods to the purchaser without the production of a delivery order from the bailor, or some documentary evidence of title to the goods on the part of the stranger who demands them; but he may, if he pleases, at once attorn to the purchaser, and rely upon the title of the latter (*o*).

If the bailee has received the chattels upon the terms that he is to deliver them to the bailor, or to any person authorized by him to receive them, a *bond fide* purchaser or mortgagee, who is in possession of a bill of sale, or assignment, or mortgage, executed by the bailor, transferring all the bailor's interest in the chattels to such purchaser or mortgagee, may, on presenting such bill of sale or mortgage to the bailee, lawfully demand possession of the chattels, and in case of the refusal of the latter to deliver them to him within a reasonable time after the demand (*ante*, p. 186), may maintain an action for the conversion or detention of the property (*p*), the bill of sale or mortgage, signed by the bailor, being an authority or direction to the bailee to deliver up the chattels to the purchaser or mortgagee; but if there be a mere oral agreement of sale, and no warrant, or authority, or direction from the bailor for the delivery of the goods, the refusal of the bailee to deliver them to the stranger would be no proof of a conversion or of a wrongful detainer. It is to a case of this sort, where there has been a mere oral transfer of chattels by a bailor, without any warrant or authority from the latter to the bailee to deliver them to the transferee, that the dictum of Holt, C. J., must be taken to apply, that if A bail goods to C, and after give his whole right in them to B, B cannot maintain detinue for them against C, because the special property that C acquires by the bailment is not thereby transferred to B (*q*).

If the bailor is not himself the owner of the goods, but has some special property therein, or is himself a bailee of them, and answerable over to the real owner, he is entitled to maintain an action for damage done to them, or for the loss of them (*r*).

(*n*) *Ante*, pp. 188, 189. *Lee v. Bayes*, 18 C. B. 607; 25 Law, J., C. P. 249. *Solomons v. Dawes*, 1 Esp. 82.

(*o*) *Ogle v. Atkinson*, 5 Taunt. 762. *Chesman v. Ezall*, 6 Exch. 344; *ante*, p. 188.

(*p*) *Franklin v. Neate*, 13 M. & W. 484; 1 Rolfe. Abr. DETINUE, C. 2, 3.

(*q*) *Rich v. Aldred*, 6 Mod. 216.

(*r*) *Freeman v. Birch*, 1 N. & M. 420. *Nicolls v. Bastard*, 2 C. M. & R. 660; *ante*, pp. 220-222.

Joint and separate rights of action.—If a chattel has been deposited by two joint-owners of it in the hands of a bailee, who has agreed to keep it for the two, it is not in the power of one of them to take it out of his hands without the consent of the other (s). If that were not so, each might demand the chattel, and have an action for its non-delivery, and so the bailee might be harassed with as many actions as there were joint-owners (t). But if the bailee thinks fit to deliver up the goods to one of the joint-bailors, a joint-action by all of them cannot afterwards be maintained against him, for the one who has got the goods cannot join with the others in suing for the non-delivery of them (u). And if the defendant is a mere wrong-doer, having got into his hands the property of several joint-owners, none of whom have authorized him to detain it, any one of such joint-owners may bring an action of detinue against him (x). If several joint-owners allow one of them to deal with their property, and place it in the hands of a bailee, the latter is accountable to the owner with whom he deals (y), “as if a charter be made to four, and one of them bails the charter to keep, he alone, without the others, may bring detinue (z); or all the owners may be joined as plaintiffs, except in the case of deposits of money in the hands of bankers.” Where two persons were severally entitled to separate portions of the contents of a box delivered by their agent to a railway company, to be carried for both of them, and the box was lost, it was held that they might sue jointly for damages (a).

Power of the bailee to compel rival claimants to establish their title by garnishment and by interpleader.—By the common law, whenever one person had deposited goods in the hands of another, to be re-delivered to the bailor, and a third party came and claimed the goods of the depositary, and brought an action of detinue for their recovery, the bailee might pray garnishment, *i. e.* that the bailor might be garnished or warned of the claim made by the stranger upon the depositary, and summoned to show to the court whether the goods were his property or not; and upon this prayer of garnishment a *scire facias* issued against the depositor to appear and plead with the plaintiff, and the latter thus became the defendant to the suit under the name of the garnishee, the first defendant, the depositary, being considered out of court by the

(s) *Ld. Ellenborough, May v. Harvey*, 13 East, 199. *Nathan v. Buckland*, 2 Moore, 153; ante, p. 222.

(t) *Attwood v. Ernest*, 13 C. B. 889; 22 Law, J., C. P. 225.

(u) *Brandon v. Scott*, 7 Ell. & Bl. 237; 26 Law, J., Q. B. 168.

(x) *Broadbent v. Ledward*, 11 Ad. & E.

209.

(y) *Martin, B., Walshe v. Provan*, 8 Exch. 852.

(z) *Thel. Dig. lib. ii. cap. 47, s. 8. Broadbent v. Ledward*, 11 Ad. & E. 211.

(a) *Metcalf v. Lond. & Br. Rail. Co.*, 4 C. B., N. S. 319; 27 Law, J., C. P. 333.

garnishment (b). By 1 & 2 Wm. 4, c. 58, s. 1, it is enacted that all depositaries or stakeholders who are sued in the superior courts, or the courts of pleas of Lancaster or Durham, for the recovery of deposits held by them, there being at the time other claimants thereon besides the plaintiff in such action, may apply to the court after declaration, and before plea, by affidavit or otherwise, showing that the defendant does not claim any interest in the subject-matter of the suit, but that the right thereto is claimed, or is supposed to belong to some third party, who has sued, or is expected to sue, for the same; and that the defendant does not collude with such third party, but is ready to bring into court, or to pay or dispose of the subject-matter of the action in such manner as the court, or any judge thereof, may direct; and the court, or any judge thereof, after such application has been made, may make a rule or order calling upon such third party to appear and state the nature and particulars of his claim, and maintain or relinquish it, and in the meantime stay the proceedings in the action, and, finally, order such third party to make himself defendant in the same, or some other action, and generally dispose of the claims, and make such rules or orders as may appear just and reasonable (c).

Declarations against bailees for the loss of chattels bailed to them to be kept or dealt with in the way of their trade.—If the plaintiff complains of the loss of chattels delivered by him to the defendant to be safely kept, or to be mended or repaired, or to be dealt with by the defendant in the way of his trade, it is sufficient for the plaintiff to set forth the delivery by him of the chattels to the defendant (describing them), and stating the purpose for which they were delivered, and to allege generally that the defendant, having received possession of the said chattels from the plaintiff, did not take due and proper care of them, and by reason thereof the said chattels became wholly lost to the plaintiff (d); but it is not now necessary to show on the face of the declaration how the chattels got into the hands of the defendant, or to allege that they were lost or destroyed through his negligence. If the chattels have been delivered by the plaintiff to the defendant, and the defendant is unable to return them, from any cause whatever, the ordinary declaration in detinue will suffice (e).

In actions of detinue, the declaration formerly alleged that the plaintiff delivered the chattels to the defendant, to be re-delivered on request; but this allegation of a bailment was wholly immaterial, and

(b) 3 Reeves, 448; Com. Dig. Pleader, 2 x. 8. *Rich v. Aldred*, 6 Mod. 216.

(c) *Coggs v. Bernard*, Ld. Raym. 909.

(d) *Doorman v. Jenkins*, 2 Ad. & E. 256.

(e) *Reeve v. Palmer*, 5 C. B., N. S. 84.
Jones v. Dowle, 9 M. & W. 19.

not traversable, the gist of the action being the detainer of the property (*f*); and the form given by the Common Law Procedure Act simply alleges that the defendant detains from the plaintiff his goods and chattels (describing them), or his title-deeds of land called ——— in the county of ———, describing the deeds, and that the plaintiff claims a return of the goods and chattels, or deeds, or their value, and £—— for their detention (*g*). If any special damage has resulted to the plaintiff from the detention, the nature of it should be set forth on the face of the declaration. If, for example, by reason of the detention by the defendant of the title-deeds to an estate, the plaintiff has been prevented from selling or letting property to advantage, and from receiving money, the fact should be stated and relied upon in aggravation of the damages.

Declarations against bailees for damage to chattels bailed to them.—Where the plaintiff's declaration alleged that the defendant undertook, safely and securely, to raise up several hogsheads of brandy of the plaintiff then in a certain cellar, and to lay them down again in a certain other cellar, and that the defendant and his servants so negligently and carelessly put down the hogsheads in the said other cellar that, through want of care on their part, the casks were staved, and a great quantity of brandy was spilt, it was held that the declaration disclosed a good cause of action, though it did not allege that the defendant was a common porter, or that he was to have any reward for his pains (*h*).

If the plaintiff complains of an injury done to a horse lent by him to the defendant, it is sufficient to set forth the plaintiff's possession of the horse, the delivery of it by the plaintiff to the defendant for a certain specified purpose, or to be ridden in a moderate, careful, and proper manner, and to aver that the defendant used the horse for a different purpose from that for which it was lent, showing in what way it was used, and that the defendant did not take due and proper care of the horse, but used and managed it so carelessly and imprudently that the horse was, through the carelessness and negligence of the defendant, greatly injured and lessened in value.

Of the plea of not guilty.—In actions for loss of, or damage to, goods, the plea of not guilty operates, as we have seen, as a denial only of the wrongful act alleged to have been committed by the defendant. Thus, in an action against a bailee for the loss of, or damage to, goods delivered to him to keep, or to be carried, or otherwise dealt with, the plea of not guilty will operate as a denial of the loss or damage, but not of the

(*f*) *Clossman v. White*, 7 C. B. 56.

Sched. B. 20.

(*g*) 15 & 16 Vict. c. 76, s. 59; and

(*h*) *Coggs v. Bernard*, Ld. Raym. 909.

receipt of the goods by the defendant for the purpose set forth in the declaration, or of the plaintiff's property in the goods (i).

What may be given in evidence under the plea of non-detinet.—The plea of non-detinet, alleging that the defendant does not detain the goods and chattels in the declaration mentioned, operates as a denial of the detention of the goods by the defendant, but not of the plaintiff's property therein; and no other defence than such denial is admissible under that plea (k). If, therefore, the defence be that the defendant was justified in detaining the goods, in respect of some special property in them, or as having a lien upon them, he must set forth such right specially on the record. He cannot give in evidence, under the plea of non-detinet, that the goods were pawned to him for money which has not been paid; neither can he give in evidence a gift from the plaintiff, for that proves that he does not detain the plaintiff's goods, and must be put in issue by a plea denying the plaintiff's right of property in the goods (l). If the defendant claims a right to retain possession of the goods on the ground that he is himself joint-owner of them with the plaintiff, or that he is tenant-in-common of them with him, his interest should be specially pleaded and set forth upon the record (m). But under the general issue the defendant may show that the goods belonged to a firm in partnership, and were placed in the defendant's hands by a solvent partner, to be sold for the purpose of paying the partnership debts (n).

Pleas setting up a delivery of the chattels to one of several joint-plaintiffs on the record.—We have already seen that it is a good defence to an action brought by several joint-plaintiffs against a defendant, for the recovery of chattels deposited in his hands by a joint-bailment from all of them, to plead that, before the commencement of the action, the chattels mentioned in the declaration were delivered by the defendant to one of the plaintiffs (ante, p. 289).

Pleas denying the plaintiff's property in the goods.—Under a plea alleging that the goods and chattels in the declaration mentioned were not, nor are they, the goods and chattels of the plaintiff, the defendant may set up a jus tertii, and show that the goods were not the goods of the plaintiff at the time they were delivered to the defendant; that the defendant had no notice thereof until the true owner afterwards gave notice of his title, and forbade the defendant to deliver up the goods to the plaintiff. It has been held by the Court of Queen's Bench that the defendant, under a plea denying that the goods detained were the goods of the plaintiff, may show

(i) Reg. Gen. Hil. Term, 16 Vict. 1 Ell. & Bl. App. lxxx. lxxxii.

(k) Reg. Gen. Hil. T. 16 Vict. 15, 1 Ell. & Bl. App. lxxxi.

(l) *Richards v. Frankum*, 6 M. & W. 420.

(m) *Mason v. Farnell*, 12 M. & W. 684.

(n) *Morgan v. Marquis*, 23 Law, J., Exch. 21; 9 Exch. 145.

that he had a lien upon them (o) ; but the Court of Exchequer has come to a different decision, and holds that if the defendant sets up a right to detain on the ground of lien, he must plead such right specially on the record. "We are aware," observes Alderson, B., "that this is contrary to an opinion of the Court of Queen's Bench in the case of *Lane v. Tewson*; but we cannot agree with that decision. The case was not fully argued before the court, nor were the authorities, which we think have decided that question, fully laid before them" (p).

Pleas justifying the detention of chattels under a claim of lien (q) usually allege, that the chattels mentioned in the declaration were delivered by the plaintiff to the defendant, to be worked upon, repaired, or mended, by the defendant for hire in the way of his trade ; and that the defendant worked upon, repaired, or mended, the chattels, and that a certain specified sum of money became due to the defendant in respect of such work and labour, and that the plaintiff has not paid or tendered to the defendant the said sum so due to him, and that the defendant detained the chattels as security for the payment thereof. If the defendant wishes to set up a general lien for work done on other goods of the plaintiff, the defendant should show on the face of his plea whether he founds his claim on custom or contract. If he claims a general lien by custom of trade, he should show the nature of the trade he carries on ; the existence of the custom ; the delivery to him of goods, from time to time, to be worked upon or dealt with by him for hire in the way of his trade, subject to such custom ; the dealing with the goods by him, so as to entitle him to his hire ; the amount due to him at the time he received the goods ; the work done by him thereon, and his claim to detain them until he has been paid the general balance due to him (r).

Pleas setting forth or offering a return of the goods with satisfaction of the damages from the detention.—The defendant cannot plead a payment of money into court in satisfaction and discharge of the plaintiff's claim, for the plaintiff has a right, under s. 78 of the Common Law Procedure Act, 1854, to apply to the court, or a judge, to order that execution shall issue for the return of the chattel detained, without giving the defendant the option of retaining the chattel upon paying the value assessed ; and such a plea, if allowed, would have the effect of depriving the plaintiff of that right (s). The defendant should by his plea offer to return the goods and pay the money into court in satisfaction of the damages sustained by their detention (t).

(o) *Lane v. Tewson*, 12 Ad. & E. 116.

(p) *Mason v. Farnell*, 12 M. & W. 684.

(q) *Barnewell v. Williams*, 7 M. & Gr. 408, ante, pp. 193, 225.

(r) *Coombs v. Noad*, 10 M. & W. 127.

Cumpston v. Haigh, 2 Bing. N. C. 449.

Leuckhart v. Cooper, 3 ib. 99.

(s) *Allan v. Dunn*, 1 H. & N. 572 ; 20 Law, J., Exch. 185.

(t) *Crossfield v. Such*, 8 Exch. 163.

Evidence at the trial—Proof on the part of the plaintiff.—Although the only plea on the record be a plea of not guilty, or non-detinet, the plaintiff must nevertheless give some general evidence of a right on his part to have the chattels delivered up to him. If he proves that the goods were at one time in his possession, and that they were taken away by the defendant; or if the plaintiff shows that he himself delivered the goods to the defendant, and afterwards demanded them back again, and that the defendant refused to deliver them, he establishes a *prima facie* right to the possession of the goods, and will be entitled to a verdict under a plea of not guilty. But if the goods were not delivered by the plaintiff to the defendant, or taken out of the possession of the plaintiff, there is nothing to show that he has any right to have them (*u*). If it appears, on the plaintiff's own showing, that he and the defendant are joint-owners of the goods, or tenants-in-common of them, he does not establish any right to take them out of the hands of the defendant, nor does he prove that the defendant detains the goods from the plaintiff, for one of several joint-owners, or tenants-in-common, of a chattel, who has got possession of the chattel, has a right, as we have seen, to retain such possession (*x*).

Where a testator, two years before his death, gave some railway debentures to the defendant, intending to transfer the money secured by them to the defendant, and delivered the debentures to the defendant, who took possession of them, and locked them up in his own desk, but no transfer of the debts secured by the debentures was ever made, in accordance with the act of parliament regulating the transfer of such securities, and after the testator's death his executors sued the defendant for detaining the debentures, it was held that they were not entitled to recover them (*y*).

Generally, however, the charters and evidences of title to property belong to the parties in whom the legal interest in the property is vested (*z*).

The detention necessary to support an action of detinue is an adverse or wrongful detention. It must be proved that the defendant withholds the goods, and prevents the plaintiff from having the possession of them. There should be evidence of a request on the part of the plaintiff to have the goods delivered to him, and a refusal to deliver on the part of the defendant. A defendant, having the goods in his possession, is not by reason thereof bound to seek out the plaintiff and send them to him.

(*u*) *Land v. North*, 4 Doug. 286; ante, p. 289.

(*x*) *Foster v. Crabb*, 12 C. B. 151; ante, p. 192.

(*y*) *Barton v. Gainer*, 3 H. & N. 380;

27 Law, J., Exch. 390. *Kelsack v. Nicholson*, Cro. Eliz. 400.

(*z*) Ante, pp. 197, 198. *Searle v. Law*, 15 Sim. 390.

The plaintiff must come for them (*a*). It may be that the goods are the plaintiff's, and yet the detention of them by the defendant may be perfectly lawful (*b*).

If the plaintiff makes out a *prima facie* right to the possession of the chattels, and shows that he has demanded them, and that the defendant detains them from him, the title or right of property in the goods cannot be investigated unless it has been put in issue by a plea traversing the plaintiff's right of property.

Evidence for the defence.—As the authorities show that it is no answer to an action of detinue, when a demand is made for the re-delivery of a chattel, to say that the defendant is unable to comply with the demand, by reason of his own negligence or breach of duty, it is clearly no answer to say that he has lost the chattel, and is consequently unable to re-deliver it to the plaintiff (*c*).

If the defendant relies upon a plea denying the plaintiff's right of property in, or right of possession of, the goods, the defendant must prove his title to them. A bailee is not estopped, as we have seen, from showing that the bailor had a defeasible title, and that his title has been defeated by matter subsequent to the bailment or to the recognition of the title by the defendant (*d*). He may refuse to re-deliver the goods to the bailor on the ground that they are the property of another person, who has demanded and received them, or who has forbidden the bailee to part with the possession of them (*e*); but the bailee cannot, if the possession of the bailor was a lawful possession, and the bailment was not founded in fraud, of his own accord set up the *jus tertii* (*f*). If the bailor was a trespasser or a thief in possessing himself of the goods, or the bailment was made with intent to defraud, he may justify his refusal to deliver them up to the bailor, whether the true owner has or has not interposed to prevent delivery.

Where the plaintiff in an action for the detention of plate proved that he had pawned the plate with the defendant, and afterwards sought to redeem it, and tendered the amount due upon it, but the defendant refused to deliver it up, it was held that the defendant might, under a plea alleging that the plate was not the property of the plaintiff, show that the plaintiff had, prior to the deposit of the plate with the defendant, transferred it by bill of sale to a purchaser, who, nevertheless, allowed the plaintiff to continue in possession of it; that the plate had been deposited with the defendant in fraud of such purchaser, and that the

(a) *Clements v. Flight*, 10 M. & W. 42;
Fitz. Nat. Brev. 138 A.

(b) *Closeman v. White*, 7 C. B. 55.

(c) *Reeve v. Palmer*, 5 C. B., N. S. 90, 92.

(d) *Thorne v. Tilbury*, 3 H. & N. 534;
27 Law. J., Exch. 407; ante, pp. 226, 230.

(e) *Shelbury v. Scotsford*, Yelv. 22.

(f) *Armory v. Delamirie*, 1 Str. 505.

defendant detained the plate by the order and under the authority of the latter (g).

Effect of proof of the defendants having abandoned the possession of the chattel before the commencement of the action.—It is no answer to an action for detaining goods to show that the defendant abandoned possession of the goods before action, by delivering them over to some third party. The evidence of the detention is, that the defendant having taken possession of the plaintiff's chattel, does not return it when demanded (h). But if the defendant has parted with the possession of the property before the plaintiff's title to it accrued, he has not then detained it as against the plaintiff, and is not liable in detinue. Thus, where the defendant took possession of goods to which he conceived himself to be entitled under a will, which turned out to be invalid from want of due execution, and before letters of administration were taken out, and before there was any legal representative appointed with authority to demand and receive the goods, the defendant delivered them back to the party from whom he received them, and then the plaintiff took out administration and demanded the property of the defendant, it was held that he could not recover, as the defendant had never detained the goods as against him (i).

Of the damages recoverable in actions for detaining chattels—Orders for the delivery to the plaintiff of the specific thing detained.—In the old action of detinue, the defendant had the option of retaining possession of the chattel detained, paying to the plaintiff the sum at which the jury thought proper to assess its value (k). "The judgment," observes Frowike, C. J., "is, that the plaintiff shall recover the goods or their value; then shall issue a writ to the sheriff to distrain the defendant to deliver the goods, and if he will not, then the value as it is taxed by the inquisition. And so it is in the election of the defendant to deliver to the plaintiff the goods or the value" (l). This option on the part of the defendant being felt to operate as a hardship upon the plaintiff in many cases, it has been taken away by the Common Law Procedure Act, 1854, which enacts, s. 78, that the court or a judge shall have power, if they or he see fit so to do, upon the application of the plaintiff in any action for the detention of any chattel, to order that execution shall issue for the return of the chattel detained, without giving the defendant the option of retaining such chattel upon paying the value assessed, and if the chattel cannot be found, and unless the court or a judge should otherwise order, the sheriff shall distrain the defendant by all his lands and chattels in the sheriff's bailiwick, till the

(g) *Cheesman v. Exall*, 6 Exch. 344.

(h) *Jones v. Dowle*, 9 M. & W. 19.

(i) *Crossfield v. Such*, 8 Exch. 828.

(k) *Phillips v. Jones*, 15 Q. B. 867.

(l) *Keilw.* 64 b.; *Yelv.* 71.

defendant render such chattel, or, at the option of the plaintiff, that he cause to be made of the defendant's goods the assessed value of such chattel: provided that the plaintiff shall, either by the same or a separate writ of execution, be entitled to have made of the defendant's goods the damages, costs, and interest in such action.

The jurisdiction of the judge, under s. 78 of this statute, is solely applicable to a case where the value is found, so that no order can be made where such value has not been found (*m*). The regular and legal finding of the jury, under s. 78, is a finding of so much for the value of the thing detained, and so much by way of damages for its detention. If the value of the chattel is not assessed by the jury, the course provided by s. 78 is not applicable.

Assessment of the value of the things detained.—The value of the thing detained should be assessed at the highest price it bore in the market at any time during the period of its detention (*n*); and where the value is doubtful, and the defendant might have returned it if he had thought fit, every fair presumption and inference should be made in favour of the owner of the property seeking its restitution, and against the wrong-doer who has detained it from him. But where the value of the article lies peculiarly within the knowledge of the plaintiff, he should prove the value of it, in order to enable the jury to make a correct assessment of the damages. Thus, when he sues for the detention of letters and documents, he should prove the nature of the letters, and of what use they were to him (*o*). If he sues for the detaining of title-deeds, he should prove the value of the property to which they refer, and that the deeds are essential to the establishment of the title, and he will then be entitled to have the damages assessed at the value of the estate (*p*).

Having assessed the value of the thing detained, the jury should then assess a certain sum by way of damages for the detention of it. Those who take upon themselves to detain the property of another are answerable for all the consequences that naturally result, in the ordinary course of things, from the wrongful act (*q*).

Assessment of damages where the whole, or part, of the goods have been delivered up after action.—The object of an action for detaining goods is to recover the goods in specie, or their value to be assessed by a jury, and also damages occasioned by their detention. This object is only partially answered by the delivery of the goods to the plaintiff, and their acceptance by him since the commencement of the suit: the plaintiff having a right to

(*m*) *Chilton v. Carrington*, 15 C. B. 730;
24 Law, J., C. P. 78.

(*n*) *Archer v. Williams*, 2 C. & K. 27.
Barrow v. Arnaud, 8 Q. B. 609.

(*o*) *Anderson v. Passman*, 7 C. & P. 197.
(*p*) *Rolle's Abr. DETINUE*, E.

(*q*) *Davis v. Lond. & North West. Rail. Co.*, 7th Week Rep. 105.

recover by the verdict of the jury the damage he has sustained by reason of the goods having been improperly detained. If all or any of the goods have been delivered up after suit, the plaintiff can have no judgment to recover them or their value, but he may have judgment to recover damages for their detention if the plaintiff has sustained any; and for the residue not delivered up, the plaintiff may have the usual judgment to recover them or their value, and damages for their detention (*r*). In an action of detainee for several goods, which were collectively valued at one sum in the declaration and by the jury, it was held that if all the goods were not given up—if one article was withheld—the defendant was liable for the value of all; but in detainee for two things, the defendant may before verdict give up one, and plead as to the other (*s*). If there is a good defence to part of the goods, by reason that the defendant was always ready to deliver them, the jury must assess the value of the residue of the goods, and damages for the detention, but none as to the goods delivered up. If there was no defence as to them, then the jury must assess the value of the residue of the goods, and damages for the prior detention of those that were delivered up (*t*).

The jury may find the fact of the return or re-delivery of the chattel specially, and confine themselves to an assessment of damages for the detention of it. In an action for detaining railway-scrip, which had been delivered up to the plaintiff after the commencement of the action, under a judge's order, it was held that the judge was warranted in directing the jury at the trial, that in estimating the damages they might take into consideration the difference in the value of the scrip at the time of the demand and the time of its delivery to the plaintiff under the judge's order (*u*).

Where railway-scrip shares or stock have been unlawfully detained after demand, and given up after the commencement of the action, the measure of damages is the highest sum the scrip could have been sold for during the period of its detention, deducting the value of it at the time it was received back by the plaintiff. The wrong-doer cannot get off with less than that, and may have to pay greater damages (*x*).

Wherever the defendant has wrongfully detained the plaintiff's chattels, or has wrongfully withheld from him the means of obtaining possession of them, he is answerable for all the loss naturally resulting in the ordinary

(*r*) *Crossfield v. Such*, 8 Exch. 165.

(*s*) Bro. Abr. TENDER, pl. 39.

(*t*) *Crossfield v. Such*, 8 Exch. 164;
22 Law, J., ib. 65. *Pawly v. Holly*, 2 W.

Bl. 853.

(*u*) *Williams v. Archer*, 5 C. B. 318.
Barrow v. Arnaud, 8 Q. B. 609.

(*x*) *Archer v. Williams*, 2 C. & K. 27.

course of things from his wrongful act, provided the special damage is specified and claimed in the plaintiff's declaration (*y*).

Evidence in mitigation of damages.—In an action for damages for the detention of goods, it may be shown in mitigation of damages that the goods were subsequently seized by revenue officers, and forfeited to the crown for non-payment of duty (*z*).

A defendant who has wrongfully detained the plaintiff's horse, cannot make the expense of the horse's keep, whilst he was wrongfully detained, a ground for reduction of the damages (*a*).

(*y*) *Barrow v. Arnaud*, 8 Q. B. 610.

(*z*) *Davis v. Nest*, 6 C. & P. 169.

(*a*) *Wormer v. Biggs*, 2 C. & K. 36.

CHAPTER IX.

OF NEGLIGENCE AND BREACH OF DUTY ON THE PART OF
COMMON CARRIERS, COMMON FERRYMEN, COMMON
INNKEEPERS, AND LODGING-HOUSE KEEPERS.SECTION I.—*Of negligence and breach of duty on the part of common carriers.*—

Of the duty of common carriers to accept and carry goods and passengers—Who may be said to be a common carrier—Of the publick profession of railway companies made through the medium of their time-tables—Of the duty of railway and canal companies to afford all reasonable facilities for the carriage of passengers, merchandise, and chattels—Loss of goods by common carriers—Fraudulent concealment of value and risk by consignors—Inability of the common carrier to rid himself by notice, or to impose conditions on his customers exonerating him from the publick duties of his profession and calling—Statutory exemption of common carriers from liability in respect of the loss of gold and silver, and valuables, when the value of the articles has not been declared—Loss of goods from theft by common carriers' servants—Notices, conditions, and special contracts by railway companies—Loss of luggage

by railway companies—Delivery of goods at the place of destination—Delivery of luggage at railway stations—Acceptance of goods to be carried beyond the limits of a particular line of railway—Effect of the refusal of the consignee to receive the goods—Lien of common carriers—Negligence of common ferrymen.

SECTION II.—*Negligence and breach of duty on the part of common innkeepers and lodging-house keepers.*—Who may be said to be a common innkeeper—Loss of goods by common innkeepers—Losses occasioned by the misconduct of the guest—Liability of lodging-house keepers in respect of the loss of goods of their lodgers.

SECTION III.—*Of actions and proceedings against common carriers and common innkeepers.*—Summary proceedings against railway companies for not receiving and forwarding traffic—Parties to actions against common carriers and common innkeepers—Pleadings—Defences—Evidence—Damages recoverable.

SECTION I.

OF NEGLIGENCE AND BREACH OF DUTY ON THE PART OF COMMON CARRIERS.

Of the duties and responsibilities of common carriers.—Every common carrier is bound to accept and carry all such things as he publickly professes to carry for all persons who are ready and willing to pay him his customary hire, provided he has room in his cart or carriage for their

conveyance, and has declared his intention to set out on his accustomed journey (*b*). He is bound to carry them to and from the places to which he professes to carry, although one of those places may be without the realm (*c*); for whenever a man undertakes the publick office or profession of a common carrier of goods he undertakes a publick trust for the benefit of the rest of his fellow-subjects, and is bound to serve the subject in all the things that are within the reach and comprehension of such an office, under pain of an action against him (*d*).

The nature and extent of the employment or business which the common carrier expressly or impliedly holds himself out as undertaking will regulate the extent of his rights, duties, and responsibilities. If he selects a particular line or description of business, he cannot, so long as he adheres to it with good faith, be compelled to go beyond it. A common carrier of merchandise, for example, cannot be compelled to carry coals, marble, money, or bank-notes, dogs, pigs, horses, or live animals. A common carrier of passengers only cannot be compelled to carry merchandise, and a common carrier of merchandise and parcels cannot be compelled to carry passengers (*e*). But he may, if he pleases, carry under a special acceptance or a special contract, any article which he does not profess to carry, and does not commonly carry, and by this special contract he may define the nature and extent of his engagement, and the degree of risk he will incur, stipulating that in the particular transaction he is not to be regarded as being in the exercise of his public employment, but as carrying in a private capacity, and incurring no responsibility beyond that of an ordinary bailee for hire, answerable only for his own misconduct and negligence, and that of the servants and workmen he employs for executing the work.

Every common carrier of passengers with luggage is bound to take the customary quantity of luggage with each passenger, consisting of articles of clothing, and such things as a traveller usually carries with him for his own personal convenience, but he is not bound to carry merchandise or articles wholly unconnected with luggage, unless he professes to carry merchandise, or unless the traveller tenders or is ready to pay the customary hire for merchandise (*f*).

Who may be said to be a common carrier.—Every person who plies with a carriage by land, or a boat or vessel by water, between different places, and professes openly to carry passengers and goods for hire, is a COMMON CARRIER. Such are railway companies, who profess to carry passengers,

(*b*) Bac. Abr. CARRIERS, B. *Pickford v. Grand Junc. R. Co.* 8 M. & W. 372.

(*c*) *Crouch v. Lond. & North W. Ry. Co.*, 14 C. B. 290; 23 Law, J., C. P. 73.

(*d*) Keilwey, 50, pl. 4.

(*e*) *Johnson v. Mid. Rail. Co.*, 4 Exch. 373.

(*f*) *Gt. North. Ry. Co. v. Shepherd*, 8 Exch. 30; 21 Law, J., Exch. 114.

parcels, and merchandize from one place to another, stage-coach and stage-waggon proprietors, lightermen, hoymen, barge-owners, canal boatmen, and the owners and masters of ships and steamboats employed as general ships for the transportation of all persons offering themselves or their goods to be conveyed for hire to the port of destination (g). The owner of a cart or carriage who does not ply regularly for hire to a particular destination, but merely lets out a private carriage, with horses and driver, by the hour, day, or job, to proceed to any destination ordered by the hirer, is not a common carrier. A London cab-driver or hackney-coachman, for example, is not a common carrier (h).

Of the publick profession of railway companies made through the medium of their time-tables.—If a railway company publishes, or authorises the publication of a time-table, representing that a train will run at a particular hour to a particular place, and the representation is false, the company is responsible in damages to all persons who have acted upon the faith of the representation, and have been deceived and put to expense, and have sustained damage thereby (i). The company make a continuous representation whilst they continue to hold out printed or written papers as being their time-tables, and they thereby make a publick profession that they will exercise their vocation of common carriers, and dispatch passengers or goods, as the case may be, to certain specified places at or about the time named in such time-tables; and if they fail to do so they commit a breach of their duty as common carriers, and are responsible in damages to those who tender themselves or their goods for conveyance at the appointed time, and find that there is no train about to start (k).

Of the duty of railway and canal companies to afford all reasonable facilities for the carriage of passengers, merchandize, and chattels.—By the Railway and Canal Traffic Act (17 & 18 Vict. c. 31) it is enacted (s. 2), that every railway company and canal company shall, according to their respective powers, afford all reasonable facilities for the receiving, and forwarding, and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats, and other vehicles; and no such company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever; nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvan-

(g) *Bac. Abr. CARRIERS, A. Lovett v. C. P. 182.*

Hobbs, 2 Show. 127. *Ingate v. Christie*, (i) Post, ch. 11, s. 1.

3 C. & K. 61.

(h) *Brind v. Dale*, 8 C. & P. 207.

Ross v. Hill, 2 C. B. 887; 15 Law, J.,

(k) *Denton v. Gt. Northern Rail. Co.*,

5 Ell. & Bl. 868; 25 Law, J., Q. B. 129.

tage in any respect whatsoever; and every railway company and canal company having or working railways or canals which form part of a continuous line of railway or canal, or railway and canal communication, or which have the terminus, station, or wharf of the one, near the terminus, station, or wharf of the other, shall afford all due and reasonable facilities for receiving and forwarding all the traffic arriving by one of such railways or canals to the other, without any unreasonable delay, and without any such preference, or advantage, or prejudice; or disadvantage, as aforesaid, and so that no obstruction may be offered to the publick desirous of using such railways and canals as a continuous line of communication, and so that all reasonable accommodation may, by means of the railways and canals of the several companies, be at all times afforded to the publick.

If railways are blocked up and impeded by snow the company is bound to use all reasonable exertions to forward the passengers, though extra expense must be incurred by the company in so doing, which they have no means of recovering from their passengers; but the owners of goods and cattle have no right to complain that extraordinary efforts which are made to forward passengers are not used to forward cattle and goods. "If a snow-storm occurs which makes it impossible to forward cattle except by extraordinary means, involving additional expense, the company are not bound to use such means and to incur such expense (l).

Whenever there has been an apparent preference in respect of the conveyance of goods conceded by a railway company to certain persons to the prejudice of a complainant, there is sufficient to call upon the company for an explanation and justification of their conduct in the matter (m).

Loss of goods by common carriers.—"The law," observes Holt, C. J., "charges every person exercising the publick employment of a common carrier, common hoyman, master of a ship intrusted to carry goods, against all events but acts of God and enemies of the king. For though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politic establishment contrived by the policy of the law for the safety of all persons, the necessity of whose affairs obliges them to trust these sort of persons that they may be safe in their dealings. For else these carriers might have an opportunity of undoing all persons that had any dealings with them by combining with thieves, &c.; and yet doing it in such a clandestine manner as would not be possible to be discovered. And this is the reason the law is founded upon in that point" (n).

(l) *Briddon v. Gt. North. Rail. Co.*, 28 Law, J., Exch. 51.

West., ib. 81.

(m) *Garton v. Brist. & Ex. Rail. Co.*, 28 Law, J., C. P. 306. *Baxendale v. Gt.*

(n) *Coggs v. Bernard*, Raym. 909; 1 Smith's Lead. Cas. 92, 93.

By the term "act of God" is meant something in opposition to the act of man, such as storms, lightning, and tempests, and inevitable accidents not resulting from human agency. If the danger or the accident, though unavoidable, has been occasioned by the act of man, the carrier cannot avail himself of it as an excuse for the non-delivery of the goods (o). Thus, where an action was brought against a common carrier for not safely carrying and delivering a quantity of hops, and it appeared that a fire broke out in a building adjoining a booth under which the carrier had placed the hops, and burnt with unextinguishable violence, and extended itself to the hops, and consumed them, without any neglect or default on the part of the carrier himself, it was held that inasmuch as the fire had not been occasioned by lightning, but by the act of man, the occurrence of the disaster constituted no answer to the action (p)! If the goods have been destroyed or swept away by rains and floods, the circumstances attendant upon the loss must be regarded, in order to determine whether it has been occasioned by the act of God or the act of man. If the common carrier has neglected to provide proper coverings for the goods; if he has gone out of his way to meet the danger; if he has travelled by unusual roads, or crossed a plain subject to inundations when he might have kept the high ground and been safe, the loss occasioned thereby is a loss from the act or negligence of man, and the common carrier is consequently responsible therefor (q).

If a barge-owner who carries goods for hire on a canal accepts certain goods to be carried for hire, and rats gnaw a hole in the barge, and cause a leak, and the goods are injured, the barge-owner is responsible for the damage (r). He is not, of course, responsible for any deterioration in the value of the goods resulting from the negligence or want of care of the owner or the consignor, such as defective packing, nor for losses occasioned by an inherent defect in the article causing its destruction. If, however, the defective packing of goods is patent and visible, and easily remedied, and he accepts the goods for conveyance, he is to take all reasonable means to provide against the defect, and secure their safety. Where a dog, with a string about his neck, was delivered to a common carrier to be carried, and was tied by the string in a watch-box, and shortly afterwards the dog slipped his head through the noose, and escaped, and was never seen afterwards, and an action was brought to recover the value of the dog, and it was contended that the owner ought to have taken care that the cord was properly secured round the dog's neck, it was held that as the

(o) *Oakley v. Ports. &c. St. Packet Co.*,
11 Exch. 622; 25 Law, J., Exch. 99.

(p) *Forward v. Pittard*, 1 T. R. 33.
Hyde v. Trent Nav. Co., 5 T. R. 399.

(q) *Doct. & Stud. Dial.* 2, ch. 38; *Noy*,
ch. 43.

(r) *Dale v. Hall*, 1 Wils. 281.

common carrier had the means of seeing that the dog was insufficiently secured, he ought to have locked him up or taken other proper means to secure him, and that he was responsible for the loss (*s*).

If a cargo or load of goods weighing a certain weight be delivered to a common carrier to be carried for hire, and the cargo on its arrival at its destination is deficient in weight, there is a *prima facie* presumption of negligence on the part of the carrier, which the latter must rebut by showing that the deficiency of weight arose from causes over which he had no control (*t*).

If the accident or casualty causing the loss of the goods is occasioned by the misconduct of a third party, and not by any fault or neglect on the part of the common carrier himself, the latter is, nevertheless, responsible to the owner for the loss, as he has himself a remedy over against the offending party. Thus, where the ship of a common carrier by water drove on an anchor in the river Humber, and was sunk, and the goods on board were injured, and the accident was occasioned by the neglect of a third party in not having his buoy out to mark the place where his anchor lay, it was held that the common carrier was nevertheless bound to make good the loss (*u*).

If a man professes to be a common carrier of passengers merely, and only receives occasionally, and at his own option, some trifling articles of luggage with such passengers, to be carried gratuitously for the accommodation of the latter, he cannot be charged as a common carrier of goods for the loss of them. He is, in such a case, a gratuitous bailee of the goods, and chargeable only with the liabilities and responsibilities of a person who gratuitously undertakes to carry goods for another. Such is an omnibus proprietor, who professes only to carry passengers and receives his hire solely therefor, but occasionally receives and carries gratuitously small bundles and parcels for the accommodation of his passengers. As he does not profess to carry goods for hire, he cannot be compelled to receive them as a common carrier of goods, neither can he be charged except as a gratuitous bailee for the loss of them. If, however, the carrier or coach proprietor professes to carry both passengers and luggage, he is clothed, as regards the conveyance of the luggage, with the obligations and responsibilities of a common carrier of goods for hire (*x*), whether the hire is paid by the passenger or by some other person on his behalf or for his benefit (*y*).

Exemption of the common carrier from liability in cases of fraudulent concealment of value and risk by the consignor.—If goods delivered to be

(*s*) *Stuart v. Crawley*, 2 Stark. 324.

(*t*) *Hawkes v. Smith*, 1 Car. & M. 72.

(*u*) *Trent Nav. Co. v. Ward*, 3 Esp. 130.

(*x*) *Brooke v. Pickwick*, 4 Bing. 218.

(*y*) *Marshall v. York, Newc. &c. Rail. Co.*, 11 C. B. 655; 21 Law, J., C. P. 9.

carried are lost or stolen by the way, and the conduct of the bailor or consignor himself has in any way conduced to the loss, he has no ground at common law for seeking compensation at the hands of the common carrier. If a man, for example, sends bank-notes, sovereigns, or valuables, to a common carrier to be carried disguised as merchandize, or as a parcel of ordinary value, requiring no more than ordinary care, and the valuables are stolen, the common carrier is not responsible at common law for the loss, inasmuch as the neglect of the consignor in not apprising him of the extraordinary value of the parcel, in order that extraordinary care might have been taken of it, may have been the occasion of that loss. Thus, where the consignor concealed a bank-note amongst some hay in an old nail-bag, which he delivered to the common carrier to be carried (*x*), and a quantity of guineas in an ordinary brown-paper parcel, tied with a string (*a*), and a number of sovereigns concealed in six pounds of tea (*b*), and the money so sent was lost by the way, it was held that the common carrier was not responsible for the loss. "The degree of care that a man may be reasonably required to take of anything, depends upon the quality and value of the thing, and the temptation it affords to theft. *Magno periculo custoditur quod multis placet*, and it cannot be denied that a box of notes or money affords much greater temptation to theft than a parcel of equal size containing less valuable articles" (*c*). The actual value of the parcel may have transpired unknown to the carrier, and have invited depredation and occasioned the loss; and if so, the consignor himself is the cause of his own misfortune, and has no claim either in law or in conscience against the carrier for compensation. Had the latter been made aware of the unusual value of the parcel intrusted to him, he might have taken proper means to secure himself against the increased risk, and "the holding out by the consignor as an ordinary risk what is in reality an extraordinary risk is a legal fraud — *dolus malus*,— and *ex dolo malo non oritur actio*" (*d*).

If, therefore, glass or china, or any brittle or perishable commodity, requiring great care for its safe conveyance, is bailed to a common carrier inclosed in boxes and cases, and no notice is given him of the peculiar nature of the contents of such boxes or cases, and of the increased care requisite for their safe carriage, the carrier is bound only to take that ordinary care of the thing which its general character and appearance seemed to require, and if it is broken or injured, without any gross negligence on his part, or that of his servants, he is not responsible for the damages sustained, as the consignor has himself been the cause of the

(*x*) *Gibbon v. Paynton*, 4 Burr. 2301.

(*a*) *Clay v. Willan*, 1 H. Bl. 298.

(*b*) *Bradley v. Waterhouse*, 3 C. & P.

(*c*) *Abbott, C. J.*, 4 B. & Ald. 42.

(*d*) *Bayley, J.*, *Batson v. Donovan*, 4 B. & Ald. 37. *Mayhew v. Eames*, 5 D. & R. 487; 3 B. & C. 601.

loss or injury by concealing the peculiar nature of the articles and the increased risk.

Inability of the common carrier to rid himself by notice, or to impose conditions on his customers exonerating him from the publick duties imposed upon him by the ancient custom of the realm.—A person who undertakes the public employment of a common carrier of merchandize, or of passengers and luggage, has no more right to engraft upon his employment the terms that “all merchandize is carried at the risk of the owners,” or that “all luggage is carried at the risk of the passengers,” and that “he will not be responsible if it is lost or damaged by the way,” than a common innkeeper has to refuse to receive guests except on the terms that he shall not be responsible for the safe-keeping of their goods and luggage deposited in his inn (post, s. 2). The consignor of merchandize or the passenger has a right to reject these terms, and to insist on the merchandize or the customary allowance of luggage for a passenger, to be taken at the common carrier’s risk, provided he makes the declaration of value, and is ready to pay the premium of insurance in those cases where the declaration and payment are required by law (post, p. 311). “The traveller,” justly observes an American judge, “is under a sort of moral duress, a necessity of employing the common carrier, and the latter shall not be allowed to throw off his legal liability. He shall not be privileged to make himself a common carrier for his own benefit and a mandatary or less to his employer. He is a publick servant, with certain duties defined by law, and as Ashhurst, J., said, of the duties of innkeepers they are *indelible*” (e).

“If the carrier should perchance refuse to carry the stuffe, unless promise were made unto him that he should not be charged for any misdemeanour that should be in him, the promise were void; for it were against reason and against good manners, and so it is in all other cases like” (f).

Of the statutory exemption of common carriers from liability in respect of the loss of gold and silver, title-deeds, jewellery, trinkets, and valuables, when the value thereof has not been declared, and an increased rate of charge paid.—By the stat. 11 Geo. 4, and 1 Wm. 4, c. 68, commonly called the Carriers’ Act, reciting that by reason of the frequent practice of bankers and others of sending by the publick mails, stage-coaches, and publick conveyances by land for hire, parcels and packages containing money, bills, notes, jewellery, and other articles of great value in small compass, much valuable property is rendered liable to depredation, and the responsibility of common carriers

(e) Cowen, J., *Cole v. Goodwin*, 19 Wend. 281. *Hollister v. Nowlen*, 1b. 234. Angell on Carriers, App. xviii. xxiii.

(f) Doct. & Stud. Dial. 2, ch. 39; Noy’s Maxims, ch. 48, 92.

for hire is greatly increased; and that through the frequent omission by persons sending such parcels to notify the value and nature of the contents thereof, so as to enable such common carriers, by due diligence, to protect themselves against losses arising from their legal responsibility, and the difficulty of fixing parties with knowledge of notices published by such common carriers, with the intent to limit such responsibility, they have become exposed to great and unavoidable risks, and have thereby sustained heavy losses; it is enacted, that no common carrier by land for hire shall be liable for the loss of, or injury to, any gold or silver coin, or any gold or silver in a manufactured state, or any precious stones, jewellery, watches, clocks, or time-pieces, trinkets, bills, orders, notes, or securities for payment of money, stamps, maps, writings, title-deeds, paintings, engravings, pictures, gold or silver plate, or plated articles, glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials, furs, or lace, contained in any parcel or package which shall have been delivered either to be carried for hire or to accompany the person of any passenger in any publick conveyance, when the value of such articles or property contained in such parcel or package shall exceed the sum of TEN POUNDS, unless at the time of the delivery thereof at the office, warehouse, or receiving-house of such common carrier, or to his book-keeper, coachman, or other servant, for the purpose of being carried, or of accompanying the person of any passenger, the *value* and *nature* of such articles or property shall have been DECLARED by the person sending or delivering the same; and the increased charge therein-after mentioned, or an engagement to pay the same, accepted by the person receiving such parcel or package.

Of the fixing up of notices of the increased rate of charge.—And (s. 2) that when any parcel or package containing any of the specified articles shall be delivered, and its value and contents declared, and such value shall exceed TEN POUNDS, it shall be lawful for such common carriers to demand and receive an increased rate of charge, to be notified by some notice affixed in legible characters in some publick and conspicuous part of the office, warehouse, or receiving-house where such parcels are received by them for the purpose of conveyance, stating the increased rates of charge required to be paid over and above the ordinary rate of carriage as a compensation for the greater risk and care to be taken for the safe conveyance of such valuable articles, and all persons sending or delivering parcels containing such valuable articles at such office shall be bound by such notice, without further proof of the same having come to their knowledge. And (s. 3) that when the value shall have been so declared, and the increased rate of charge paid, or an engagement to pay the same shall have been accepted, the person

receiving such increased rate of charge, or accepting such engagement, shall, if required, sign a receipt for the parcel, acknowledging the same to have been insured, which receipt shall not be liable to any stamp duty; and if such receipt shall not be given when required, or such notice shall not have been affixed, the common carrier shall not be entitled to any benefit or advantage under the act, but shall be responsible as at common law, and be liable to refund the increased rate of charge. No public notice or declaration is (s. 4) to limit, or in anywise affect the liability at common law of any such common carriers.

Every office, warehouse, or receiving-house, which shall be used or appointed by any common carrier, for the receiving of parcels to be conveyed, is (s. 5) to be deemed and taken to be the receiving-house, warehouse, or office of such common carrier. And where any parcel shall have been delivered at any such office, and the value and contents declared, and the increased rate of charge paid, and such parcel shall have been lost or damaged, the party entitled to recover damages in respect of such loss or damage shall also be entitled (s. 7) to recover back such increased charges, in addition to the value of such parcel.

Nothing in the act is (s. 6) to annul or affect any special contract between such common carriers and any other parties for the conveyance of goods and merchandize; nor (s. 8) to protect any common carrier for hire from liability to answer for loss or injury to any goods or articles arising from the felonious acts of any coachman, guard, book-keeper, porter, or other servant in his employ, nor to protect any such coachman, &c. from liability for any loss or injury occasioned by his own personal neglect or misconduct.

When a declaration of value by the consignor is a condition precedent to any liability on the part of the common carrier.—This act, it will be observed, applies solely to common carriers by land, and the effect of it is to prevent the owner or consignor from recovering from the common carrier the value of any of the enumerated articles when the value of the contents of the parcel or package in which they are inclosed exceeds 10*l.*, and the value has not been declared, and the increased rate of charge paid by the consignor pursuant to the statute. The declaration of value must be made by the consignor, whether the common carrier has or has not a notice or tariff of charges for the increased risk of conveyance of such articles stuck up in his office, and whether the articles are delivered at the office of the common carrier; at the sender's house, on the road, or anywhere else. The act requires the person who sends the goods to take the first step by giving that information which he alone can give, and if he does not take that first step, then he cannot maintain an action for the value of the lost article by reason of the first section of the statute, which expressly says

that the common carrier shall not be liable unless the declaration is made (g). As soon, however, as this has been done, the common carrier is entitled to have and to demand an increased rate of remuneration, which is in the nature of a premium for insurance, provided he has a tariff or notice stuck up in his office of the sums he charges above the usual rate of charge for the carriage of the articles. If there is no tariff, he has then no right to charge the increased rate, and he loses (provided the declaration of value has been duly made by the consignor) the protection of the act (h). The declaration of value having been made, the common carrier has no right to know the exact nature of the contents of the parcel unless he has reasonable grounds for believing that it contains articles of a dangerous character (i).

Articles to which the statute extends.—The statute extends to all the articles enumerated in the first section, although not within the words of the preamble, “an article of great value in a small compass.” It is not sufficient for the owner to describe in writing on the outside of a parcel or box the nature of the contents. The carrier must have distinct information thereof, and an opportunity of demanding the increased rate of carriage (k). Hat bodies made of felt, which is a substance composed partly of the soft fur or down of the rabbit detached from the skin, and partly of the wool of sheep, have been held not to be “furs” within the Common Carriers’ Act (l), and wearing apparel and dresses of silk made up for use seem not to come within the operation of the act (m). By the term “writings,” is meant writings of value, and therefore an instrument in writing in an imperfect state, intended to secure a large sum of money, but not being a valid and complete security at the time of the loss, is not within the statute (n). If the contents of a parcel or package exceeding 10*l.* in value are of a miscellaneous character, consisting partly of enumerated articles and partly of things not mentioned or comprised in the act, the common carrier is released from all liability in respect of the former, but as regards the latter his common-law liability remains the same as before the passing of the statute. Thus, if a trunk containing linen and wearing apparel, jewellery, and trinkets, exceeding 10*l.* in value, be delivered to a carrier to be carried for the ordinary hire, or to accompany the person of a passenger, and such trunk is lost by the way, the carrier is not liable for

(g) *Pianciani v. Lond. & S. W. Rail. Co.*, 18 C. B. 226.

(h) *Bazendale v. Hart*, 21 Law, J., Exch. 123; 6 Exch. 780.

(i) *Crouch v. Lond. & N. W.*, 14 C. B. 295; 23 Law, J., C. P. 73.

(k) *Owen v. Burnett*, 2 C. & M. 353;

4 Tyr. 133. *Boys v. Pink*, 8 C. & P. 361.

(l) *Mayhew v. Nelson*, 6 C. & P. 58.

(m) *Davey v. Mason*, Car. & M. 50.

(n) *Stoessiger v. S. E. R. Co.*, 23 Law, J., Q. B. 293. As to pleading the act, *Smith v. Lond. & Br. & C. R. Co.*, 7 C. B. 780.

the value of the jewellery and trinkets (*o*), but he remains responsible for the value of the trunk and linen and wearing apparel, as at common law before the passing of the act. If, however, the contents of the parcel or package consist entirely of the enumerated articles, the common carrier is by the express term of the act freed from all responsibility and liability in respect of the loss thereof, if the consignee has not declared the nature and value of the article, and paid or agreed to pay the increased charge specified in the notice, although the loss may have been occasioned by the grossest negligence (*p*). If an uninsured parcel or package consists entirely of enumerated articles, the plaintiff would not be entitled to recover even the value of the box or case in which they are contained (*q*).

If the consignor, after he has made the declaration of value, objects to pay the *ad valorem* rate of carriage or premium of insurance, and wishes to have the parcel carried as a parcel of ordinary value at the ordinary rate of carriage for parcels of similar bulk and weight, the carrier may, if he pleases, waive his right to the increased remuneration or premium of insurance, and agree to carry for a smaller sum, upon the terms that he is not then to be responsible upon the extended customary liability of a common carrier, as an insurer against robbery and the dangers and accidents of the road. "This limitation," observes Parke, B., "it is competent for a common carrier to make, because, being entitled by common law to insist on the full price of carriage being paid beforehand, he may, if such price be not paid, refuse to carry upon the terms imposed by the common law and insist upon his own terms" (*r*).

Losses covered by the statute.—The term "loss" in the statute means loss of things by the carrier, or his servants, in the course of the carriage of them, either by losing them from their vehicles, or mislaying them, so that it was not known where to find them when they ought to have been delivered; and not the loss that may be sustained by an owner or consignee by reason of the non-delivery of the chattel in due time, or by reason of great delay in its delivery, whereby the use of the chattel, or the means of turning it to advantage, were lost (*s*).

Loss of goods from theft by the common carrier's servants.—Nothing contained in the Carriers' Act is, as we have seen (*s*. 8), to protect any common carrier for hire from liability to answer for loss of, or injury to, any goods or articles arising from the felonious act of any servant in the carrier's

(*o*) *Bernstein v. Bazendale*, 28 Law, J., C. P. 265.

(*p*) *Hinton v. Dibbin*, 2 Q. B. 646.

(*q*) *Wyld v. Pickford*, 8 M. & W. 402.

(*r*) *Wyld v. Pickford*, 8 M. & W. 458.

(*s*) *Hearn v. Lond. & S. W. R. Co.*, 10 Exch. 801; 24 Law, J., Exch. 180.

employ. If, therefore, the common carrier relies upon the statute as a defence, contending that there ought to have been, and that there was not, any declaration of value on the part of the consignor, of the article alleged to have been lost, the defence is rebutted, and the case taken out of the operation of the statute, by showing that the loss arose from the felonious act of the carrier's servant (*t*).

When the goods have been accepted by a carrier under a special contract for the carriage of them, the statute does not apply. Where, therefore, a common carrier has given express notice to the consignor that he will not be responsible for parcels or packages above the value of 10*l.*, unless the value is declared, and an increased rate of remuneration paid according to a printed tariff or scale of charge, and the common carrier afterwards accepts a parcel to be carried, knowing it to be worth more than 10*l.* without demanding or receiving the premium for insurance, and the parcel is purloined by his own servant, he is not necessarily responsible for the theft (*u*). Having received the goods under a special contract and not upon his customary liability as an insurer of safe conveyance, he is chargeable only for negligence and want of ordinary care. The loss by theft is *prima facie* proof of negligent keeping, but it is not absolutely conclusive, and the special carrier may exonerate himself from liability for the theft by proving his own care and watchfulness, and showing that there was no want of any proper precaution on his part to guard against theft by his servants. "If the consignor," observes Lord Tenterden, "has concealed the value of the parcel from the carrier, and has adopted a disguise for it likely to prevent the carrier from taking any particular care of the parcel, and yet not so completely concealing its nature as to prevent it from being selected for depredation by a dishonest servant, and the loss is the consequence of the means he has adopted, then he cannot maintain an action in respect of the loss" (*x*).

All persons who are actually, though casually and incidentally, employed by the common carrier in doing the work of carrying, are the servants of the latter, although they may be the regular servants of some other parties, receiving wages from them and not from the carrier (*y*).

Inability of railway and canal companies to exonerate themselves from liability for their own neglect, default, or breach of duty by notice, condition, or declaration.—By s. 7 of the Railway and Canal and Traffic Act (17 & 18 Vict. c. 31) it is enacted, that every railway company and canal company

(*t*) *Metcalf v. Lond. & Br. Rail. Co.*,
4 C. B., N. S. 307; 27 Law, J., C. P.
205.

(*u*) *Butt v. Gt. West. Rail. Co.*, 11 C. B.
140. *Gt. West. Rail. Co. v. Rimell*, 27

Law, J., C. P. 204.

(*x*) *Bradley v. Waterhouse*, 1 M. & M.
154.

(*y*) *Machu v. Lond. & S. W. R. Co.*, 2
Exch. 426.

shall be liable for the loss of or for any injury done to any horses, cattle, or other animals, or to any articles, goods, or things, in the receiving, forwarding, and delivering thereof, occasioned by the neglect or default of such company, or its servants, notwithstanding any notice, condition, or declaration, made and given by such company contrary thereto, or in anywise limiting such liability; every such notice, condition, or declaration, being thereby declared to be null and void. But it is provided that nothing therein contained shall be construed to prevent the said companies from making such conditions with respect to the receiving, forwarding, and delivering of any of the said animals, articles, goods, or things, as shall be adjudged by the court or judge before whom any question relating thereto shall be tried to be just and reasonable.

This statute does not enable railway companies to frame such regulations and make such conditions with respect to the receiving and forwarding of goods and chattels as will enable them substantially to escape from their common-law or statutory liability to carry passengers' luggage, and such things as they ordinarily profess to carry (*z*); but they may attach reasonable conditions to the receiving, forwarding, and delivering them; and then, if those reasonable conditions are not assented to and signed, they may refuse to carry.

Where an act of parliament authorised a railway company to make regulations respecting passengers' luggage, and the company, by their regulations, required the passengers to see their luggage marked with the company's labels, and stated that the company would not be responsible for the loss or detention of any article of luggage not so marked and properly addressed, and the plaintiff, who was a passenger, required the company's porter to label and take into the luggage-van some wearing apparel wrapped in a shawl, and properly addressed, and the porter refused, as the company had made it a rule not to label shawls, it was held that the company was responsible for the porter's refusal to receive the shawl; and that the company could not make regulations having the effect of divesting them of their common-law liability to receive and carry the article as luggage (*a*).

In cases where railway companies under the Carriers' Act, or the Railway Traffic Act, are entitled to demand an increased rate of charge for insuring the safe conveyance of particular articles, and the consignor objects to the increased rate of charge, and it is agreed that the company shall receive and forward certain articles uninsured, this may be taken as doing away with their common-law liability as insurers of the safe

(*z*) *Munster v. S. E. Rail. Co.*, 27 Law, J., C. P. 308.

(*a*) *Munster v. S. E. Rail. Co.*, 4 C. B., N. S. 676; 27 Law, J., C. P. 312.

conveyance of the articles, but does not exempt them from responsibility for losses by negligence through their own default (b).

If goods are accepted for conveyance under a special contract, whereby the carrier exempts himself from liability from loss or damage of a particular character, such as leakage or breakage, this will not exempt him from responsibility if the leakage or breakage has been caused by his own negligence, or the negligence of his servants in storing the goods (c).

Signature of notices, conditions, declarations, and special contracts respecting the carriage of chattels by railway and canal companies.—By s. 7 of the Railway and Canal Traffic Act it is further enacted, that no special contract between a railway and canal company and any other parties, respecting the receiving, forwarding, or delivering of any animals, articles, goods or things, as aforesaid, shall be binding upon or affect any such party, unless the same be signed by him or by the person delivering such animals, articles, goods or things respectively, for carriage.

Before the statute, every case in which a special limited liability was substituted for the general common-law obligation of the carrier, whether by notice acquiesced in, or document signed by the customer, was one of special contract, and the statute is to be construed with reference to that state of the law; so that every notice, condition, and declaration, under the statute, however reasonable, must be made in writing, and be signed in the mode provided by the statute, in order to be binding in law upon the party sought to be affected by it (d).

What are just and reasonable conditions respecting the receiving, forwarding, and delivering goods and chattels by railway companies.—The reasonableness or unreasonableness of the condition made by the company with respect to the receiving, forwarding, and delivering goods and chattels, will materially depend upon the nature of the articles to be conveyed, the degree of risk attendant upon their conveyance, the rate of charge made, and whether the railway company was bound by the common law, or by statute, to carry the articles on being paid the customary hire, or whether it was in its power to reject them altogether and refuse to carry them upon any terms (e).

Every stipulation or condition professing to exempt a railway company or canal company from liability for its own negligence or misconduct, or that of its servants and agents, is unjust and unreasonable. "It is

(b) *Peek v. North Staff. Rail. Co.*, 27 Law, J., Q. B. 470.

(c) *Phillips v. Clark*, 26 Law, J., 168; 2 C. B., N. S. 163. *M'Manus v. Lanc. & York, &c. Rail. Co.*, 4 H. & N. 327; 28 Law, J., Exch. 353.

(d) *M'Manus v. Lanc. & York Rail. Co.*,

28 Law, J., Exch. 359. *Peek v. North Staff. Rail. Co.*, 27 Law, J., Q. B. 471. *Simons v. Gl. West. Rail. Co.*, 18 C. B. 826; 26 Law, J., C. P. 25.

(e) *Pardington v. South Wales Rail. Co.*, 1 H. & N. 396. *Simons v. Gl. West. Rail. Co.*, 18 C. B. 805.

impossible," justly observes Lord Ellenborough, "without outraging common sense, to allow carriers to say 'We will receive your goods, but we will not be bound to take any care of them, and will not be answerable at all for any loss occasioned by our own misconduct, be it ever so gross and injurious'" (f).

Where horses were delivered to be forwarded by a cattle-truck from Liverpool to York for reward, and the owner was required to sign a ticket containing a memorandum to the effect that the ticket was issued subject to the owner's undertaking all risk of conveyance, loading and unloading, as the company would not be responsible for any injury or damage, however caused, occurring to live stock travelling upon the railway, or in their vehicles, and the defendant's servants provided a truck which, in external appearance, and so far as the defendant's servants knew, was sound, and sufficient for the conveyance of the horses, but it was in fact unsound, and of insufficient strength for the purpose, and a hole was made in the bottom of the truck during the journey, and one of the horses got his leg through the hole and was injured; it was held that the railway company was responsible for the damage done to the horse, notwithstanding the terms of the special contract signed by the owner of the horse. "We are of opinion," observes the court, "that the condition or special contract in this case is not just and reasonable. In order to bring the defendants within its protection, it is necessary to construe it as excluding responsibility for loss occasioned, not only by all risks of whatever kind directly incidental to the transit, but also for that caused by the insufficiency of the carriages provided by the defendants, though occasioned by their own negligence or misconduct. The sufficiency or insufficiency of the vehicles by which the companies are to carry is a matter, generally speaking, which they, and they alone, have the means of fully ascertaining; and it would be unreasonable and mischievous if they were to be allowed to absolve themselves from the consequence of neglecting to perform properly that which seems naturally to belong to them as a duty. It is unreasonable that the company should stipulate for exemption from liability for the consequences of their own negligence, however gross, or misconduct, however flagrant; and that is what the condition under consideration professes to do. That condition is therefore void, and the case stands simply upon the ground that the plaintiff has employed the defendants to carry his horses safely, and that they have used an insufficient and improper vehicle for that purpose, whereby the horses have been injured" (g).

The court is bound to look at the particular matter in each case to see

(f) *Lyon v. Mells*, 5 East, 438; and see ante, p. 310.

(g) *M'Manus v. Lanc. & York, &c.*

Rail. Co., 4 H. & N. 327; 28 Law, J., Exch. 358.

whether the condition is reasonable or not, and it has been held that a condition which seeks to relieve a railway company from the consequences of the loss or non-delivery of goods, by reason of insufficient or improper package, is not reasonable (*h*).

Commencement and duration of the liability of common carriers—Damage or loss of goods in warehouses.—When the common carrier of goods carries on the business both of a warehouseman and a common carrier, the nature and extent of his liability will depend upon the character in which he holds the goods at the time of the loss. If they are received into his warehouse to await the future orders of the owner or consignor as to their destination, he is clothed only with the ordinary duties and responsibilities of a warehouseman or bailee for hire (*i*). But if the destination is marked out, and he has nothing to do but to forward the goods on the earliest opportunity to the place indicated, he is responsible as a common carrier for any loss or damage that may occur to the goods in the warehouse, as they are then *in transitu* in contemplation of law (*k*). Whenever the common carrier receives goods to be kept until he has orders from the consignee to forward them, he holds them as a bailee for hire and not as a gratuitous bailee, although he does not charge warehouse rent (*l*).

Delivery of goods at the place of destination.—The common carrier of goods is bound, in common with all carriers for hire, to carry the goods intrusted to him for conveyance to their place of destination with reasonable expedition (*m*), and deliver them into the hands of the consignee, or of some person expressly or impliedly authorised by him to receive them; and he must of course, in all cases, take especial care that they are delivered into the hands of the right person (*n*). When the carriage is by land, the goods must be sent to the residence of the consignee, for the common carrier is not released from responsibility by leaving them at the coach-office, or at an inn by the road-side at which the coach usually stops. If he tenders them at the residence of the consignee, and is ready to deliver them on receiving payment of his hire, he has fulfilled his contract as a carrier; and if the hire is not paid he is not bound, as we have already seen, to part with the possession the goods: but he may lawfully take them back to his own warehouse, or place of business; and he holds them

(*h*) *Simons v. Gt. West. Rail. Co.*, 18 C. B. 830; 28 Law, J., C. P. 25.

(*i*) *Cairns v. Robins*, 8 M. & W. 263. *Garvis v. Trent Nav. Co.*, 4 T. R. 582.

(*k*) *Forward v. Pittard*, 1 T. R. 27; Buller, J., 5 T. R. 398. As to accidental fires in warehouses, see 6 Anne, c. 31, s. 6, made perpetual by 10 Anne, c. 14, s. 1; ante, p. 180.

(*l*) *White v. Humphrey*, 12 Jur. Q. B.

417.

(*m*) *Raphael v. Pickford*, 6 Sc. N. R. 478; 2 Dowl. N. S. 916. *Black v. Bazendale*, 1 Exch. 410; 17 Law, J., Exch. 50.

(*n*) *Golden v. Manning*, 3 Wils. 433; 2 W. Bl. 916. *Birket v. Willan*, 2 B. & Ald. 356. *Duff v. Budd*, 6 Moore, 469. *Stephenson v. Hart*, 1 M. & P. 357; 4 Bing. 470.

thenceforward not as a common carrier, but as a bailee for hire, or (if he is not entitled to charge, or does not charge, warehouse rent) as a gratuitous bailee (o). And if the consignee, having no warehouse of his own, asks him to keep the goods until he can conveniently send for them, the common carrier thenceforth holds the goods only as a warehouseman for hire, or a gratuitous bailee, according as he may or may not be paid for his care and custody of them (p). When the carriage is by water, the delivery at a wharf is not a delivery to the consignee, unless it is made so by the usage and practice of the port where the delivery takes place; but the master is bound to give the consignee notice of the arrival of the goods, and is not released from his responsibility for their safety until a reasonable time has elapsed after the giving of the notice for the consignee to come and fetch them. He cannot escape from his liability as a common carrier by immediately landing the goods at a public wharf, without giving notice to the consignee, and giving him an opportunity of receiving them from the ship's side; and if he does so land them, and they are destroyed upon the wharf by an accidental fire before the consignee has had an opportunity of taking them away, the shipowners will be responsible for the loss (q).

Delivery of luggage at railway stations.—In the case of the carriage of passengers with luggage by railway, if it is the usual course for the luggage to be taken from the train by the company's servants and delivered to the passengers on the platform, the company is bound to deliver it there. And if the company choose to provide a more convenient mode of delivering luggage to passengers by employing porters to carry it across the platform to the vehicles by which it is to be taken away, their liability as common carriers continues until the porters have discharged their duty (r).

Acceptance of goods by common carriers to be carried beyond the limits of their ordinary destination.—When a common carrier takes into his care a parcel directed to a particular place, and does not by positive agreement limit his responsibility to a part only of the distance, that is *prima facie* evidence of an undertaking on his part to carry the parcel to the place to which it is directed, although the place may be beyond the limits within which he ordinarily professes to carry on his trade of a carrier. His responsibility, therefore, continues to the door of the address to which the goods are destined, and he cannot release himself from such responsibility

(o) *Storr v. Crowley*, M'Clel. & Y. 136.

(p) *In re Webb*, 8 Taunt. 449; 6 Moore, 500.

(q) *Bourne v. Galliffe*, 3 Sc. N. R. 1; 8 ib. 804; 7 M. & Gr. 850. *Syeds v. Hay*, 4 T. R. 260. *Wardell v. Mourillyan*,

2 Esp. 693.

(r) *Richards v. Lond. & Br. &c. Rail. Co.*, 7 C. B. 839; 18 Law, J., C. P. 251. *Butcher v. Lond. & S. W. Rail. Co.*, 16 C. B. 13.

by transferring the goods to another carrier, or sending them by another conveyance (s). If a railway company, for example, accepts goods for conveyance to a particular destination, beyond the limits of its own line of railroad, and the goods are lost whilst in the hands of another railway company, to whom they have been delivered to be forwarded on their journey, the first railway company is the party to be sued by the owner of the goods for the loss of them (t), unless the company has by express contract limited its liability to loss and damage occurring on its own line of railway (u).

In the absence of special circumstances, the responsibility of a railway company in and about the conveyance of goods accepted by them for delivery at a particular destination is the same, whether their own line extends the whole distance or stops at an intermediate point, and the railway companies carrying the goods beyond the limits of the first line of railway are, in respect of the conveyance and delivery of such goods, to be regarded as the agents of the railway company which originally received the goods (x). But a special contract made with the company to whom the goods were first delivered, exempting them from liability in particular cases, will not extend to the railway companies who subsequently receive and carry the goods (y).

Loss of passengers' luggage by railway companies.—Most of the railway acts provide that, without extra charge, it shall be lawful for every passenger by railway to take with him articles of clothing of a certain weight and dimensions, and that the company shall not be responsible for the safe carriage or custody of, or for any loss of or injury to, articles carried upon the railway with, or accompanying the person of, or belonging to any passenger, or delivered for the purpose of being carried, other than such passenger's articles of clothing. Articles of clothing in the act of parliament mean such things as a man generally requires and takes with him, and are ordinarily used by travellers, and may extend to a dressing-case. A railway company has no power to make a bye-law abridging the rights of passengers in respect of their luggage, and, therefore, where the Great Western Railway Company made a bye-law to the effect that they would "not be responsible for the care of luggage

(s) *Garnett v. Willan*, 5 B. & Ald. 53.

(t) *Muschamp v. Lanc. & Prest. Rail. Co.*, 8 M. & W. 421. *Watson v. Ambergate Rail. Co.*, 15 Jur. 448. *Brist. & Ex. Rail. Co. v. Collins*, 7 H. L. C. 284. *Wilby v. West. Corn. Rail. Co.*, 2 H. & N. 709. *Scothorn v. South Staff. Rail. Co.*, 8 Exch. 345.

(u) *Fowles v. Gt. Western, &c.*, 7 Exch.

699; 22 Law. J., Exch. 78.

(x) *Crouch v. Gt. West. Rail. Co.*, 26 Law. J., Exch. 345; 6th Week. Rep. 391. *Scothorn v. South Staff. Rail. Co.*, 8 Ex. 345.

(y) *Collins v. Brist. & Ex. Rail. Co.*, 1 H. & N. 517; 26 Law. J., Exch. 108. *Mytton v. Mid. Rail. Co.*, 4 H. & N. 615.

unless booked and paid for," it was held that the bye-law was null and void (x).

Railway companies are responsible for the acts and omissions of their porters in the management and delivery of passengers' luggage, and are responsible for its safe delivery into the hands of the passenger, or into those of his appointed agent or servant, on the termination of the journey. If it is the usual course to deliver the luggage of passengers at a particular part of the platform, the company is bound to deliver it there. If a railway porter, at the request of a passenger, calls a cab, and places the passenger's luggage on the cab, and there leaves it, and comes away without having the means of identifying the vehicle, and the cab-driver goes off with the luggage before the passenger has taken his seat in the vehicle, the railway company will be responsible for the loss (a). If the luggage of a passenger is, with the knowledge of the servants of the company and with their assent, placed in the carriage in which the passenger sits, the luggage is, in point of law, in the custody of the company, so as to render them responsible for its loss, unless the loss appears to have been occasioned by some misconduct or carelessness of the passenger himself in dealing with such luggage (b).

Some of the special acts of parliament incorporating railway companies appear to have the monstrous and unreasonable provision, that every passenger travelling on the railway shall take his luggage at his own risk (c).

Loss of merchandize carried as luggage.—If a party packs merchandize in carpet-bags and portmanteaus, and passes it off to the common carrier as luggage, he commits a fraud upon the carrier, and cannot recover for the loss of it; but if he leaves it exposed, and takes it with him as mere merchandize, and the carrier thinks fit to carry it without demanding any extra remuneration, the carrier will be responsible for the loss of it (d).

Limitation of the liability of shipowners.—The Merchant Shipping Act, 1854, regulates and controls, as we have seen (ante, p. 277), the liability of owners of sea-going ships, or of shares therein, in respect of loss of or damage to goods.

Refusal of the consignee to receive the goods—Liability of the carrier as

(x) *Williams v. Gt. West. Rail. Co.*, 10 Exch. 15. *Gt. Western, &c. v. Goodman*, 12 C. B. 313; 21 Law, J., C. P. 107. *Munster v. S. E. R. Rail. Co.*, 4 C. B., N. S. 698; 27 Law, J., C. P. 312.

(a) *Butcher v. Lond. & S. W. Rail. Co.*, 16 C. B. 13; 24 Law, J., C. P. 137. *Richards v. Lond. Br. & S. C. Rail. Co.*,

7 C. B. 839.

(b) *Gt. Northern Rail. Co. v. Shepherd*, 8 Exch. 30. *Robinson v. Dunmore*, 2 B. & P. 416.

(c) *Mytton v. Mid. Rail. Co.*, 4 H. & N. 621.

(d) *Gt. North. Rail. Co. v. Shepherd*, 8 Exch. 30; 21 Law, J., Exch. 114.

bailee.—If the consignee refuses to receive the goods, the carrier is not thereby exonerated from the duty of taking reasonable care of them, and doing what is reasonable in the matter for the benefit of the consignor, or the owner of them. If the party to whom they are addressed is not ready to receive them at the place of delivery, the carrier must keep them a reasonable time, if he has a convenient place of deposit there, and if he has no place of deposit he must deal with them as any reasonably prudent person might be expected to deal with his own property (*e*). If the consignor or owner of the goods is known to him, it would be reasonable to expect that he would give him notice of the refusal of the consignee to receive them, and seek instructions for the disposal of the property. If the consignor or owner is unknown to him, no such notice can, of course, be given, or be reasonably expected (*f*); but he should deposit the goods in some place of safety, and ought not at once to send back the goods to the place from whence they came (*g*).

Of the lien of common carriers.—The common law accords to common carriers, who are bound, as we have seen, to receive and carry the goods of persons who tender them for conveyance, and are ready and willing to pay the customary hire, a right to retain the goods and chattels of such persons until they have received the customary remuneration for the services they have been compelled to render them, whether the goods are the property of the persons who have tendered them for conveyance, or the property of third parties from whom they have been fraudulently taken or stolen. Thus, where goods were stolen and delivered to a carrier to be carried to Exeter, and the owner finding them in the possession of the carrier demanded them of him, and the carrier refused to deliver them without being paid the price of their carriage, it was held that he was justified in so doing, “for when the robber brought them to him he was obliged to receive them and carry them, and therefore, since the law compelled him to carry them, it will give him remedy by retainer for the price of the carriage” (*h*).

But the carrier has no right of lien by the common law for anything beyond the price of the carriage of the goods conveyed. He cannot detain them until he has received payment of a general balance due to him from the owners of such goods. Common carriers have oftentimes attempted to obtain a lien of this description, and to secure the payment of debts due to them for the previous conveyance of goods, by giving notices to the effect that all goods delivered to them for conveyance will be holden as a

(*e*) *Ransom v. East. Coy's. Rail. Co.*,
26 Law, J., Exch. 345.

(*f*) *Hudson v. Bazendale*, 27 Law, J.,
Exch. 93.

(*g*) *Gt. West. Rail. Co. v. Crouch*, 3 H.
& N. 196; 27 Law, J., Exch. 345.

(*h*) *Exeter Carriers' case*, *Ld. Raym.*
867.

security for the payment of such debts, as well as for the payment of the price of their own carriage (i). But the common carrier has no right to make any such bargain or stipulation. He is bound, as we have already seen, so long as he has room in his cart or carriage, to convey the goods of all persons on being tendered his hire for the carriage of the particular goods sought to be conveyed, and if he does obtain a promise from the consignor to the effect that he shall, if he carries the goods, have a right to retain them in his hands as a security for the payment of an antecedent debt, such promise is a mere nudum pactum, of no force or effect in the eye of the law (k).

If a person goes to a coach-office and orders a place to be booked for him by a particular coach, and that be done, and he then leaves his portmanteau at the coach-office, the coach-proprietor will have a lien upon the portmanteau for his reasonable and customary remuneration and charge in such cases, but not for the full amount of the coach fare. If the party merely leaves his portmanteau, and no place is booked, the coach-proprietor has no lien upon the portmanteau at all (l). When goods delivered to be carried are received from the waggon of the common carrier by the consignee, and are merely carried into the warehouse to be weighed, the carrier has no right to charge for warehouse-room; and if the goods are taken up on the road, and have never been booked, he has no right to charge for the booking of them; and if, after tender of the price of the carriage, he detains them for these small charges, the detention is unlawful, and an action may be brought against him in respect thereof (m). A common carrier of passengers and luggage has a right of lien upon the luggage for the payment of the price of the carriage of the passenger as well as of his effects, but he has of course no right to detain the person of the passenger or the clothes he is actually wearing (n). And if the carrier once parts with the possession of the goods he loses his lien, as in other cases. But if he loses the possession by fraud, the lien revives if possession is recovered (o).

Duties and responsibilities of common ferrymen.—A common ferryman is a common carrier, and is bound to provide safe and secure ferryboats, and safe slips and landing-stages, and all proper means and appliances for the safe transit of persons who may have occasion to use the ferry for themselves, or for the transit of their horses and carriages, luggage and merchandize. Where, therefore, the defendants, as ferrymen, used steamboats for transit across the river Mersey, from which passengers and animals

(i) *Wright v. Snell*, 5 B. & Ald. 353.

(k) *Bulter v. Woolcott*, 2 N. R., 5 B. & P. 64. *Oppenheim v. Russell*, 3 B. & P. 47. *Rushforth v. Hadfield*, 6 East, 527; 7 ib. 227.

(l) *Higgins v. Bretherton*, 5 C. & P. 2.

(m) *Lambert v. Robinson*, 1 Esp. 119.

(n) *Wolf v. Summers*, 2 Campb. 631.

(o) *Wallace v. Woodgate*, R. & M.

could not safely land without landing-stages and slips, and they provided an insecure handrail to a landing-stage, which broke and caused the death of the plaintiff's mare, it was held that they were bound to make good the loss (p).

Loss of goods by common ferrymen and common hoymen.—Common ferrymen and common hoymen being common carriers are responsible for the safe delivery of goods intrusted to them for conveyance, unless they have been prevented by storm, lightning, or tempest, and inevitable accident (q). In *Mouse's* case it was resolved, "that if the ferryman surcharge the barge, it is lawful for any of the passengers in time of accident and necessity to cast the things out of the barge for safety of the lives of the passengers; and the owners shall have their remedy upon the surcharge against the ferryman, for the fault was in him upon the surcharge; but if no surcharge was, but the danger accrued only by the act of God, as by tempest, no default being in the ferryman, every one ought to bear his loss for the safeguard and life of a man, for 'interest reipublicæ quod homines conserventur.'" (r).

SECTION II.

NEGLIGENCE AND BREACH OF DUTY ON THE PART OF COMMON INNKEEPERS AND LODGING-HOUSE KEEPERS.

Of the duty of common innkeepers to provide food and shelter for travellers and wayfarers.—Every man who opens an inn by the wayside, and professes to exercise the business and employment of a common innkeeper, is, by the custom of the realm, bound to afford such shelter and accommodation as he possesses to all travellers who apply for it, and tender, or are able and ready to pay, the customary hire, and are not drunk or disorderly, or labouring under contagious or infectious diseases; and if he neglects or refuses so to do, he is liable to an action for the recovery of any damages that may have been sustained by reason of such refusal; and also to an indictment at common law (s). The innkeeper is bound, more-

(p) *Willoughby v. Horridge*, 12 C. B. 751; 22 Law, J., C. P. 90.

(q) *Amies v. Stevens*, 1 Str. 128; Bac. Abr. CARRIERS, B. *Oakley v. Ports. &c. St. Packet Co.*; ante, p. 307.

(r) *Mouse's* case, 12 Co. 63.

(s) *Hawthorn v. Hammond*, 1 C. & K. 404. *Howell v. Jackson*, 6 C. & P. 725. *Rez v. Ivens*, 7 C. & P. 219.

over, to receive and provide for the horses of all travellers who alight at his inn, if he has room in his stables; even, it is said, of those who choose only to put up their horses, resorting elsewhere for lodging and entertainment. But he is not bound to receive the goods of a person who professes merely to make use of the inn as a place of deposit, and not to lodge there as a guest (*t*). Neither is he bound to provide for his guest the precise room that the latter may choose to select, nor to provide him with a bedroom, if he declares it to be his intention to sit up all night. All that he is required to do is to find reasonable and proper accommodation for his guests; and if he tenders such accommodation, and the guest refuses it, he may compel the latter to quit the inn, and seek for accommodation and lodging elsewhere (*u*).

The extent of the publick duty and obligation of the innkeeper depends upon the nature of his publick profession. If he has only a stable for a horse he is not bound to receive a carriage. If he professes only to receive ordinary luggage accompanying the person of a traveller, he is not bound to take in articles of unusual, extraordinary, and inconvenient bulk, nor goods which do not accompany the person of the guest (*x*).

The innkeeper cannot discharge himself of the duty and burthen imposed upon him by the common law under pretence of sickness, want of understanding, or absence from home (*y*); but if an infant keeps a common inn, an action upon the custom of inns will not lie against him, for his privilege of infancy shall be preferred, and take place of the custom (*z*).

Who may be said to be a common innkeeper.—"Every person who makes it his business to entertain travellers and passengers, and provide lodging and necessaries for them and their horses, and attendants, is a common innkeeper; and it is in no way material whether he have any sign before his door or not" (*a*). A London "coffee-house," where beds and provisions are furnished by the day or for the night, or for a longer period, to persons in certain stations of life, who may think fit to apply for them, is a common inn (*b*). But if a man merely opens a house for the sale of provisions and refreshments, and does not profess to furnish beds and lodging for the night, he is not a common innkeeper (*c*). And if he professes to let only private lodgings, and does not offer his house to the public as a place of reception, and entertainment, and lodging, for all

(*t*) *Saunders v. Plummer*, Orl. Bridg. 227.

(*u*) *Fell v. Knight*, 8 M. & W. 276.

(*x*) *Broadwood v. Granara*, 10 Exch. 423; 24 Law, J., Exch. 1.

(*y*) *Bac. Abr. INNS*, C 4.

(*z*) *Cross v. Androes*, Roll. Abr. 2; Carth. 161.

(*a*) *Bac. Abr. INNS*, B. *Parker v. Flint*, 12 Mod. 255.

(*b*) *Thompson v. Lacy*, 3 B. & Ald. 283.

(*c*) *Doe v. Laming*, 4 Campb. 77.

comers who are able and willing to pay for the accommodation offered, he cannot be said to keep a common inn.

Of the duty of the innkeeper to protect his guest from robbery and theft.—It has been justly observed by the civilians, that the common wants and necessities of mankind compel men to trust valuable property to the keepers of publick inns, who have frequent opportunities of combining and colluding with thieves, to the prejudice of those who trust them; and it was thought right in the Roman law to deprive such persons of the temptation to do wrong, and to compel them to be honest by making them responsible for the safety of goods intrusted to their keeping. By a publick edict of the Roman prætor it was ordained, that if shipmasters and carriers, innkeepers and stablekeepers, did not restore what they had received to keep *SAFE*, he would give judgment against them (*d*)

The construction put upon this edict was, not that the shipmaster, carrier, or innkeeper was bound to deliver the goods safe at all events; but that he was bound to deliver them, unless prevented by a *fatale damnum*, or a loss by what was termed the decree of fate, or order of destiny, such as a loss by lightning, or an earthquake, or a sudden inundation that could not have been foreseen, and that no human care or skill could have provided against or avoided; or an irresistible attack by pirates and hostile forces, the enemies of the state. The spirit of this edict has been universally adopted by the jurisprudence of continental Europe, and was introduced at an early period into our common law.

The original writ against an hostler or innkeeper for the loss of the goods of his guest declares that “*secundum legem et consuetudinem regni nostri Angliæ hospitatores qui hospitia communia tenent ad hospitandos homines, per partes ubi hujusmodi hospitia existunt transeuntes, et in eisdem hospitantes, eorum bona et cætalla infra hospitia illa existentia absque subtractione, seu amissione, custodire die et nocte tenentur, ita quod pro defectu hujusmodi hospitatorum seu servientium suorum hospitibus hujusmodi damnum non eveniat ullo modo*” (*e*).

From the terms of this writ, which is the foundation of the common law concerning hostlers, it was resolved in Calve's case (*f*):—

“1. That the lodging ought to be a common inn: for if a man be lodged, at his request, with another who is not an innholder, if he be robbed in his house by the servants of him who lodged him, or any other,

(*d*) “*Ait Prætor, NAUTÆ, CAUPONES, STABULARII, QUOD CUIUSQUE SALVUM FORÈ RECEPERINT NISI RESTITUUNT IN EOS JUDICIUM DABO.*”—Dig. lib. 4, tit. 9. “*Maxima est utilitas hujus edicti; quia necesse est plerumque eorum fidem sequi, et res custodiæ eorum committere*

. et nisi hoc esset statutum materia daretur cum furibus adversus eos quos recipiunt, coeundi.”—Dig. lib. 4, tit. 9, s. 1.

(*e*) Reg. Br. F. N. B. 94, a. b.

(*f*) 8 Co. 32; 1 Smith's L. C. 87.

he shall not answer for it, for the words are, '*hospitatores qui communia hospitia tenent.*' And so are the books, &c. And the plaintiff ought to declare that the defendant keeps *commune hospitium*.

"2. That it appears from the words of the writ, that common inns are instituted for passengers and wayfaring men, and therefore if a neighbour, who is no traveller, as a friend, at the request of the innholder, lodges there, and his goods be stolen, &c., he shall not have an action, for the writ is, '*ad hospitandos homines, &c., transeuntes, et in eisdem hospitantes,*' &c.

"3. That the words '*eorum bona et catalla infra hospitium illa existentia*' show that the innholder, by law, shall answer for nothing that is out of his inn, but only for those things which are *infra hospitium*, and the books agree that the innholder is bound to answer for himself and for his family of the chambers and stables, for they are *infra hospitium*; and that if an innholder lodges a man and his horse, and the owner requires the horse to be put to pasture, and there he is stolen, the innholder shall not answer for him; but that if the owner doth not require it, but the innholder, of his own head, puts his guest's horse to grass, he shall answer for him if he be stolen.

"4. That the words '*pro defectu hospitatorum seu servientium suorum*' show that the innholder shall not be charged, unless there be a default in him, or his servants, in the well and safe-keeping and custody of their guests' goods and chattels within his common inn, for the innkeeper is bound in law to keep them safe, without any stealing or purloining; and it is no excuse for the innkeeper to say that he delivered the guest the key of the chamber in which he is lodged, and that he left the chamber-door open, but he ought to keep the goods and chattels of his guest there in safety. And although the guest doth not deliver his goods to the innholder to keep, nor acquaints him with them, yet if they be carried away or stolen the innkeeper shall be charged, although they who stole or carried away the goods be unknown. But if the guest's servant, or he who comes with him, or he whom he desires to be lodged with him, steals or carries away his goods, the innkeeper shall not be charged, for there the fault is in the guest to have such a companion or servant. But if the innkeeper appoints one to lodge with him, he shall answer for him. If the innkeeper requires his guest that he will put his goods in such a chamber under lock and key, and then he will warrant them, otherwise not; and the guest lets them lie in an outer court, where they are taken away, the innkeeper shall not be charged, for the fault is in the guest.

"5. That although the words '*bona et catalla*' do not of their proper nature extend to charters and evidences concerning freehold, or inheritance, or obligations, or other deeds or specialties, being things in action, yet in

this case it is expounded by the latter words to extend to them; and therefore, if one brings a bag or chest, &c. of evidences into the inn, or obligations, deeds, or other specialties, and, by default of the innkeeper, they are taken away, the innkeeper shall answer for them; but the words, 'bona et catalla' extend only to moveables, and, therefore, if the guest be beaten in the inn, the innkeeper shall not answer for it. These words aforesaid extend to all moveable goods, although of them felony cannot be committed" (g).

Where a guest laid a reticule containing money on her bed, and afterwards went into her sitting-room, the door of which was opposite the bedroom, and remained there about five minutes, and then sent her companion for the reticule, which was missing, and could not afterwards be found, it was held that the innkeeper was bound to make good the loss (h).

A traveller went to an inn, taking with him divers packages of silk, some of which were taken up-stairs to his bed-room, and others were, by his directions, carried into the commercial room, into which he was shown. After remaining for some days therein, and after having been several times taken out and brought back again by the traveller, the goods were stolen, and an action having been brought against the innkeeper to recover the value of the property, it was shown to be the practice of the inn to take all the luggage of the guests into their bed-rooms, unless orders to the contrary were given; and it was contended that the traveller, by ordering the goods to be taken into the commercial room, which was a place of common resort for all the guests indiscriminately, had taken the goods under his own protection, and could not therefore make the innkeeper responsible for the loss; but the court held, that if the innkeeper had intended not to be responsible for goods deposited by the guests in the commercial room, he should have declared his intention to them at the time the goods were placed there (i). But if the guest is guilty of gross negligence in leaving a box containing money or bank-notes in the commercial room, after having opened it and exposed the contents to the bystanders, he cannot, if the money is stolen, charge the innkeeper with the loss (k).

A servant having been sent with goods to market, and being unable to sell them, went to an inn, and asked if he could leave the goods there until next market-day. The innkeeper's wife said they were very full of parcels, and declined to take charge of them. The servant then sat down

(g) *Calve's case*, 8 Co. 32.

(h) *Kent v. Shuckard*, 2 B. & Ad. 803.

(i) *Richmond v. Smith*, 8 B. & C. 9.

(k) *Armistead v. White or Wilde*, 20 Law, J., Q. B. 524; 17 Q. B. 261.

in the inn, ordered something to drink, and put the goods on the floor immediately behind him. When he got up again the goods were gone, and were never afterwards seen or heard of, and it was held that the innkeeper was responsible for the loss (l). But "if a guest come to a common innkeeper to harbour there, and he say that his house is full of guests, and do not admit him, &c., and the party say he will make shift among the other guests, and be there robbed of his goods, the innkeeper shall not be charged" (m). And if a guest takes upon himself the exclusive charge of the goods which he brings into the house of an innkeeper, he cannot afterwards charge the innkeeper with the loss (n). "I agree," observes Lord Ellenborough, "in what is stated in Calye's case, that the mere delivery of the key of a room will not dispense with the care and attention due from the landlord, and that he cannot exonerate himself by merely handing a key over to his guest; but if the guest take the key, it is a very proper question for the jury, whether he takes it *animo custodiendi*, and for the purpose of exempting the landlord from his liability, or whether he takes it merely because the landlord forced it upon him, or for the sake of securing greater privacy, in order to prevent persons from intruding themselves into his room" (o).

Whenever the goods and chattels of the guest have been actually delivered to the innkeeper or his servants, the latter cannot, of course, discharge himself from the strict common-law responsibility by showing that the goods were stolen outside the inn, if he has himself placed them in the spot from whence they have been taken. Where the plaintiff, a farmer, drove his horse and gig to an inn on a market-day, and the hostler took the horse out of the gig and put him into a stable, and then placed the gig outside of the inn-yard, in a part of the open street, where the innkeeper was in the habit of placing the carriages of his guests on fair-days, and the gig was stolen therefrom by some person unknown, it was held that the innkeeper was responsible for the loss (p). And the innkeeper is liable, although sick at the time, and incapable of attending to his affairs, for he is bound to retain trusty servants to secure the goods of his guests when incapable of doing so himself (q). This extended responsibility of the innkeeper, which makes him an insurer of the goods against loss by robbery, does not extend to losses occasioned by an accidental fire (ante, p. 130), nor to damage or injury to the goods which is the result of accident. The innkeeper is not responsible for injuries which the horses of guests inflict upon each other in the stables of the inn,

(l) *Bennet v. Mellor*, 5 T. R. 276.

(m) *White's case*, Dyer, 158 b.

(n) *Farnworth v. Packwood*, 1 Stark. 249.

(o) 4 M. & S. 310; 1 Stark. 252 n.

(p) *Jones v. Tyler*, 1 Ad. & E. 522; 3 N. & M. 576.

(q) *Cross v. Andrews*, Cro. Eliz. 622.

provided he has taken all due care to prevent the introduction into the stables of vicious and kicking horses (r).

Losses occasioned by the misconduct of the guest.—If a guest at an inn asks for a private room for the purpose of exhibiting goods for sale, and receives customers, and invites the admission of strangers into the inn, upon whose ingress and egress the innkeeper has no check, the latter is not responsible for the safety of the goods in the room so used (s). And if the guest is himself guilty of negligence in leaving money and valuables about in rooms of common resort, he cannot, if the money and valuables are stolen, charge the innkeeper with the loss (t).

The rule of law resulting from all the authorities is, that the goods remain under the charge of the innkeeper and the protection of the inn, so as to make the innkeeper liable for a breach of duty, unless the negligence of the guest occasions the loss in such a way as that the loss would not have happened if the guest had used the ordinary care that a prudent man may be reasonably expected to have taken under the circumstances (u).

Who are guests and travellers.—He who seeks to charge another as an innkeeper for the loss of goods must show that he was a traveller and guest at the inn. If a man who has been a guest gives up his room and quits the inn for a few days, intending to return, and asks for permission to leave his goods at the inn, and the innkeeper takes charge of them, the latter is clothed only with the ordinary duties and responsibilities of a bailee, for a man does not become a guest at an inn by the mere delivery of goods to the landlord to keep (x). It has been said, however, that a man may become "a guest by leaving his horse as much as if he had staid himself, because the horse must be fed, by which the innkeeper has gain, otherwise than if he had left a trunk or a dead thing" (y). "If an host invite one to supper, and, the night being far spent, invites him to stay all night, if he is afterwards robbed, yet shall not the host be charged (as an innkeeper), for this guest was no traveller."

The length of time that a man may remain at an inn does not affect or alter his character as a traveller, or in any way qualify or vary the common-law liability of the innkeeper. Thus, "If A comes with goods to an inn in London, and stays there for a week, month, or longer, and is there robbed of them, he shall have an action against his host; though, perhaps, being at the end of his journey, he cannot then be said to be

(r) *Dawson v. Chamney*, 5 Q. B. 165; 13 Law, J., Q. B. 33.

(s) *Burgess v. Clements*, 1 Stark. 261 n.; 4 M. & S. 306.

(t) *Armistead v. White*, 20 Law, J., Q. B. 524; 17 Q. B. 261. *Sanders v.*

Spencer, Dyer, 266 a; ante, p. 320.

(u) *Oashill v. Wright*, 6 Ell. & Bl. 900.

(x) *Gelley v. Clerk*, Cro. Jac. 188.

Smith v. Dearlove, 6 C. B. 132.

(y) *York v. Grindstone*, 1 Salk. 386.

transeuns according to the writ in the register" (z). But if a man takes apartments in an inn for a term, by the week, month, or year, for example, or if he resides in the inn under a special contract for his bed and board, he is not in contemplation of law sojourning at the inn as a traveller, but rather in the character of a lodger at a private boarding-house. If, therefore, he is robbed in the house, he cannot charge the landlord as an innkeeper, but only as an ordinary lodging-house-keeper (a). Holt, C. J., is reported to have held, "that if one come to an inn and make a previous contract for lodging for a set time, and do not eat or drink there, he is no guest but a lodger, and as such he is not under the innkeeper's protection; but if he eat and drink there it is otherwise, or if he pay for his diet there, though he do not take it there" (b).

Of the lien of innkeepers.—As the law imposes upon the common innkeeper the burthen of receiving and taking care of the goods and chattels of all travellers and guests who alight at, and take up their abode within the inn, it gives him a right to retain such goods and chattels as a pledge for the payment of the reckoning of the guest. If a horse or a carriage is put up in the stables of the inn by a guest, the innkeeper has a lien on the horse for its keep, and on the carriage for its standing-room, whether the horse or the carriage be the property of the guest or of some third party, from whom it has been fraudulently taken or stolen, unless the innkeeper knew at the time he received the guest that he was not the true owner of the horse or the carriage (c). But if the property does not accompany the person of the guest when he comes to the inn, but is afterwards brought there for the use of the guest, and is known by the innkeeper to be the property of another at the time it is brought to the inn, the innkeeper cannot set up any lien upon it for the debt due from his guest (d). He has no lien upon an animal put into his stable unless it be brought by a guest (e). The innkeeper has no right to take a parcel or other property out of the hands of the guest, nor can he detain the property of the guest if he has previously agreed to give the latter credit for his entertainment; nor can the innkeeper detain goods as a security for the payment of the reckoning for beer and ale drunk by a guest, unless the requirements of the stat. 11 & 12 Wm. III. c. 15, as to selling beer in stamped vessels, and rendering an account of the number of quarts and pints drunk, have been complied

(z) Bac. Abr. INNS, C 5.

(a) Warburton, J., *Watbroke v. Grifflth*, Moore, 877. *Grimston v. Innkeeper*, Helt. 49.

(b) *Parker v. Flint*, 12 Mod. 255.

(c) *York v. Greenaugh*, 2 Raym. 866. *Skipwith v. —*, 1 Bulst. 170. *Johnson v. Hill*, 3 Stark. 172. *Turrill v. Crawley*,

13 Q. B. 107; 18 Law, J., Q. B. 155. *Snead v. Watkins*, 1 C. B., N. S. 267; 26 Law, J., C. P. 57. Ency. du Dr. (AUBERGE), 25.

(d) *Broadwood v. Granara*, 10 Exch. 422; 24 Law, J., Exch. 1.

(e) *Binns v. Pigot*, 9 C. & P. 209.

with ; nor can he detain any goods not received by him in his character of innkeeper, and not brought to the inn by a person who is received and lodged in the inn as a guest (*f*).

The innkeeper holds the chattels detained by him in the nature of a pledge, so that if he once permits his guest to take them away, and so relinquishes his pledge, he cannot afterwards retake them. Therefore, if the innkeeper allows the guest to remove his horses after a debt has been incurred for keeping them, and they are afterwards brought to the inn and a new debt contracted, the innkeeper can detain them for the latter portion of the debt, but not for the former (*g*). And it is said that if several horses are brought to an inn by the guest, each is a pledge for its own keep, but not for the keep of the others ; so that if the hosteller permit him to take away all but one, he cannot retain that one until the expense of the whole is paid (*h*). If the guest takes the chattel away without the hosteller's consent, the latter may take it on a fresh pursuit as a distress rescued, if he follow promptly, but not otherwise (*i*).

Detention of the person of the guest for non-payment of the reckoning.—

It was thought at one time that the law accorded to the common innkeeper the right or privilege of detaining the person of a guest who had eaten food in the inn, until he had received payment of his reckoning (*k*) ; but this is said to have been a vulgar error, founded on the dictum of a single judge, and has been overruled, as it would arm the innkeeper with the power of detaining a man perhaps for life, without any legal process or adjudication in the matter (*l*).

Of the liability of lodging-house-keepers in respect of the safe keeping of the goods of their lodgers.—We have seen, by the first resolution in Calye's case (ante, p. 327), it was holden " that if a man be lodged with another who is not an innholder, if he be robbed in his house by the servants of him who lodged him or any other, he shall not answer for it." But it is the duty of every lodging-house-keeper to take such care of his house and the things of his lodger in it as every prudent householder might be expected to take, and to be careful in the choice of his servants. If articles belonging to the lodger are actually placed in his hands, he will be responsible like any other bailee (ante, p. 267) for the loss of them ; but he is not a bailee of them merely by reason of their having accompanied the person of the lodger and been placed in his house by the latter. " I find," observes Wightman, J., " no authority for holding that a boarding-

(*f*) *Sunbof v. Alford*, 3 M. & W. 248.
Smith v. Dearlove, 6 C. B. 132 ; 17 Law,
 J., C. P. 219 ; 12 Jur. 377.

(*g*) *Jones v. Thurlow*, 8 Mod. 173. *Jones*
v. Pearle, Str. 556, 557.

(*h*) *Moss v. Townsend*, 1 Bulstr. 207.

(*i*) *Ross v. Bramslead*, 2 Ro. 438.

(*k*) Bac. Abr. INNS, D.

(*l*) *Sunbof v. Alford*, 3 M. & W. 254.

house-keeper is a bailee of the goods of his guest at all, or that he is bound to take more care about the goods of his guest, which are no further given into his care than by being in his house with the guest, than he, as a prudent owner, would take with respect to his own. The utmost care of a prudent owner might fail from the unforeseen negligence or dishonesty of a servant, against which it might be impossible for him to guard. If he is guilty of negligence in the selection of his servants, or in keeping such as he may well distrust, he can hardly be considered as taking the care of a prudent owner, and on that ground might be liable for a loss occasioned by the servants' negligence."

If, therefore, a boarder at a boarding or lodging-house, who has his boxes and luggage in his possession and under his own controul, directs them to be taken from his room and to be deposited in the hall of the boarding-house, and then sends one of the servants away out of the house on an errand, and the servant leaves the door ajar, and a thief seizes the opportunity to enter the house and steal one of the articles deposited in the hall, the boarding-house-keeper, who had nothing to do with the placing of the things in the hall or the sending out the servant, is not responsible for the theft (*m*).

SECTION III.

OF ACTIONS AND PROCEEDINGS AGAINST COMMON CARRIERS AND COMMON INNKEEPERS FOR NEGLIGENCE AND BREACH OF DUTY.

Summary proceedings against railway and canal companies for not receiving and forwarding merchandize and chattels.—Persons complaining against railway or canal companies for not affording reasonable facilities for receiving, forwarding, and delivering traffic upon and from the several railways and canals belonging to and worked by such companies, or of anything done, or omitted to be done, in contravention of the Railway and Canal Traffic Act (*ante*, p. 305), may obtain relief by summary application to the Court of Common Pleas, or to any judge of such court, by motion or summons (*n*).

Parties to be made plaintiffs in actions against carriers for loss of or injury to chattels.—The action against a carrier for the loss of goods

(*m*) *Dansey v. Richardson*, 3 Ell. & Bl. 144; 23 Law, J., Q. B. 223.

(*n*) 17 & 18 Vict. c. 31, ss. 3-6.

intrusted to him for conveyance should, in the absence of an express contract for the carriage of them, be brought by the owner of the goods, as the party damnified.

Where goods have been delivered to a carrier to be carried to a person designated by the consignor, the consignee is *prima facie* the owner of the goods, and the person to whom the carrier is responsible for their safe conveyance. This is generally the case when goods are delivered to a carrier to be conveyed to a purchaser in fulfilment of a contract of sale, for as soon as the goods are delivered to the carrier they become the property of the purchaser; so that if they are lost, the purchaser, and not the vendor, must sue for the loss of them (o). But if they are not delivered to the carrier in execution of a contract of sale, but by the consignor and owner to be conveyed to his servant in the country, then the consignor, and not the consignee, would be the proper party to sue for the loss of them. So, if from fraud or non-compliance with the Statute of Frauds, no actual sale has taken place, and no interest in the goods has vested in the consignee, by reason of the delivery to the carrier, then the consignor is the proper person to sue for the loss of the goods (p).

Where the consignor had delivered goods to a carrier, in obedience to a fictitious order, which professed to come from a well-known tradesman of respectability, but had in reality been sent by a swindler, it was held that as no *bond fide* sale had taken place, the consignor had not been divested of his property in the goods, and that he was, therefore, the proper party to sue the carrier for a neglect of duty in delivering them to the swindler, who applied for them at the carrier's office, instead of delivering them at the residence of the tradesman to whom they were addressed (q). But when the carrier, in consideration of a sum of money paid, or agreed to be paid, by the consignor, as the price of the carriage of goods, agrees with him to convey them to the consignee, it is no answer to an action brought by the consignor against the carrier, upon such special contract, to say that he is not the owner of the goods. In such a case the action may be brought either by the consignor or by the consignee (r).

Where a laundress, residing at Hammersmith, was in the habit of employing a carrier to convey the linen she washed from Hammersmith to the owner at London, and the carrier was paid by the laundress, it was

(o) *Dawes v. Peck*, 8 T. R. 332.
Coombs v. Brist. & Exeter Rail. Co., 27
 Law, J., Exch. 269, 402; 3 H. & N. 510.
 (p) *Coats v. Chaplin*, 3 Q. B. 439.
Addison on Contracts, p. 321, 4th edit.
 (q) *Duff v. Budd*, 6 Moore, 460. *Ste-*

phenson v. Hart, 1 M. & P. 357; 4 Bing. 476.

(r) *Davis v. James*, 5 Burr. 2680. *Bell v. Chaplain*, Hard. 321. *Moore v. Wilson*, 1 T. R. 659. *Dunlop v. Lambert*, 6 Cl. & Fin. 600.

held that the latter was entitled to maintain an action against the carrier for the loss of the goods by the way, although they belonged to the consignee (*s*). In these cases the bailee of the goods, who has a special property in them, may enforce the express contract entered into with the carrier, unless his principal interferes to prevent him. "The rule is, that either the bailor or the bailee may sue, and whichever first obtains damages it is a full satisfaction" (*t*).

Every person who has been injured by the negligent performance of the work of carrying may maintain an action for damages against the carrier, although the work was done under a special contract to which he is no party. A servant, for example, may maintain an action against a railway company, or other carrier, for injuries sustained by him from the negligent management of a train by which he was a passenger, or from the negligent execution of the work of carrying, although the contract for his conveyance was made, and the hire or fare paid, by his master, the duty of carrying carefully being a duty which arises independently of the contract (*u*).

Where a railway company was bound by statute to carry the mails, and the officers of the post-office who accompanied them, it was held that the company must exercise a reasonable care in performing the duty cast upon them by the statute, and were bound to carry safely; so that if any officer was injured by the negligent management of their trains, he was entitled to maintain an action against them for damages, although the contract for his conveyance had been entered into between the company and the Postmaster-General (*x*).

Parties to be made defendants.—When goods have been delivered to the driver of a stage-coach to be carried, and have been lost by the way, an action *ex contractu* for negligence should be brought against the coach-proprietor, and not the mere servant or agent (*y*). But as all who participate in a wrongful act are responsible *ex delicto* for the injurious consequences of it, the servant may be sued for the breach of duty as well as the master or the employer. The 8th section of the Carriers' Act (*ante*, p. 312) provides that the act shall not protect the coachman, guard, book-keeper, or other servants of the common carrier from liability for losses or injuries occasioned by their own personal neglect or misconduct.

Every railway company is responsible for the detention or conversion, by its officers and servants, of the property which has come into the hands of such servants and agents in the course of their employment in the

(*s*) *Freeman v. Birch*, 1 N. & M. 420.

(*t*) *Nicolls v. Bastard*, 2 C. M. & R. 660.

(*u*) *Marshall v. York, Newc. Berw.*, 11 C. B. 656.

(*x*) *Collett v. Lond. & North West.*, 16 Q. B. 989.

(*y*) *Williams v. Cranston*, 2 Stark. 82.

business of the company. There must be some one authorised on the part of the company at every station to receive and deliver out goods, and to do things promptly that require immediate attention, and whoever is permitted by the company to have dominion over their stations, and to exercise authority over their property, and over their porters and servants, will be presumed to be clothed with the necessary authority, and his acts, done within the scope of his ordinary employment, will be binding on the company.

Where some young quicks were forwarded by railway to the plaintiff, and the general superintendent of the company, at the request of the plaintiff, in order to keep the quicks alive, permitted them to be put into the company's ground at the railway station, where they remained under the control and charge of the superintendent, and the latter subsequently refused to deliver them up to the plaintiff, it was held that the railway company was responsible for the unlawful detention of the property by their servant (x).

The common carrier cannot qualify or limit his liability in respect of the negligence, want of skill, or carelessness of his servants and agents, in and about the carrying of the goods by any private arrangement as to remuneration out of the profits of the business or otherwise, between himself and such servants or agents. "If a common carrier should allow his driver of the carriages some small things as perquisites, the master would, without all doubt, be still liable; and that is only a private agreement between master and servant, and only a different way of paying his servant's wages" (a).

When goods have been delivered to a railway company, to be carried to a particular destination beyond the limits of their own line of railway, and the goods are lost by the negligence of the servants employed upon an intermediate line, the railway company to whom the goods were first delivered, and with whom the contract for their conveyance was made, is the proper party to be sued for the loss, and not the company on whose line the loss actually took place (b). But every railway company which allows its railway to remain open for publick traffick, and takes toll for the use of it by other lines, is responsible to persons who sustain injury from the line being unsafe and dangerous, although such persons are conveyed along it in the carriages of some other company (ante, p. 92) (c).

(x) *Taff Vale Rail. Co. v. Giles*, 23 Law, J., Q. B. 43.

(a) Page, J., Cas. temp. Hard. 90; 5 T. R. 397.

(b) *Mytton v. Mid. Rail. Co.*, 4 H. &

N. 621; 28 Law, J., Exch. 385. *Birkett v. Whitehaven, &c. Rail. Co.*, 4 H. & N. 730.

(c) *Birkett v. Whitehaven, &c. Rail. Co.*, 4 H. & N. 736.

Declarations against a common carrier for refusing to carry goods tendered to him for conveyance should show that the defendant is a common carrier of goods plying for hire between the place where the goods were tendered to him for conveyance and the place to which they were addressed ; that the plaintiff tendered to the defendant certain goods to be carried from the one place to the other ; that the defendant had room and the means of receiving and carrying them, and the plaintiffs were ready and willing to pay him his customary hire, and the defendant would not receive and carry the goods, whereby the plaintiffs were put to great loss and inconvenience, setting forth any special damage that may have been sustained, and concluding with a claim for damages (d).

Declarations against a common carrier for the loss of goods need not set out the general custom of the realm, making the common carrier an insurer of the safe conveyance of the articles delivered to him to be carried (e). It is sufficient to allege that the defendant was a common carrier of goods for hire between two named places, or in any particular locality ; and that the plaintiff delivered to the defendant, and the defendant received from the plaintiff certain goods (describing them), to be carried for hire by the defendant as such common carrier, and to be delivered at a certain specified place for the plaintiff, and that the defendant did not safely and securely carry the goods, but so negligently conducted himself in that behalf, that through the neglect and default of the defendant in the premises, the goods became wholly lost to the plaintiff.

Declarations against an innkeeper for refusing to receive the plaintiff as a guest should allege that the defendant kept a common inn for the accommodation of travellers, and that the plaintiff then being a traveller, came to the said common inn of the defendant and required the defendant to receive the plaintiff therein as a guest, and provide him with food and lodging ; that the defendant then had sufficient room and accommodation in the said common inn to enable him to receive the plaintiff therein, and the plaintiff was then ready and willing to pay the defendant his customary hire and reward for the food and accommodation he required, yet the defendant would not receive the plaintiff into the said common inn, nor provide him with suitable food and lodging, whereby the plaintiff was obliged to depart, and to travel many miles in order to procure food and lodging elsewhere, and by reason thereof was prevented from attending, &c. (setting forth any special damage that may have been sustained), and was put to great inconvenience and expense in travelling, and was and is otherwise greatly injured.

(d) *Pickford v. Grand Junc. Rail. Co.*, 8 M. & W. 372.

(e) *Bac. Abr. CARRIERS, A.*

Declarations against an innkeeper for the loss of chattels deposited within the precincts of the inn need not set out the general custom of the realm making the innkeeper responsible for the safety of the goods of his guests, as the general custom is part of the common law (*f*), and need not be proved at the trial; but the declaration should allege that the defendant kept a common inn for the reception, lodging, and entertainment of travellers, that the plaintiff being a traveller came to the said common inn of the defendant and was received and lodged therein, and that the plaintiff brought into the said common inn certain articles (describing them), and that the defendant whilst the plaintiff abided in the said common inn as a guest, and the said articles remained within the inn, did not keep the said articles, &c. safely, but so negligently conducted himself in the matter, that they were through the negligence of the defendant taken and carried away, and have become wholly lost to the plaintiff; concluding with a claim of a certain sum for damages (*g*).

Of the plea of not guilty.—The plea of not guilty in actions for negligence, operates, as we have seen, as a denial only of the wrongful act alleged to have been committed by the defendant, and no defence other than such denial is admissible under that plea. Thus, in actions against a carrier for loss of, or damage to goods, the plea of not guilty will operate as a denial of the loss or damage, but not of the receipt of the goods by the defendant as a carrier for hire, or of the purpose for which they were received, or of the plaintiff's property in the goods (*h*).

Special pleas.—If, therefore, the defendant denies the receipt of the goods to be conveyed by him as a common carrier, or denies his receipt of them altogether, he must, by special plea or traverse, allege that he did not receive the goods to be carried as in the declaration mentioned. If the plaintiff has declared against him upon his extended liability as a common carrier, insuring the safe conveyance of the things he carries, and it appears that the things were delivered to him under a special contract, the cause of action will be disproved under this plea or traverse (*i*). If he denies the plaintiff's title or right to the possession of the property, he must plead a plea alleging that the property was not, at the time he received it to be carried, the property of the plaintiff (*k*); or, admitting that the plaintiff was the owner of the property at the time it was delivered to him, he may show that the plaintiff's right to the possession of it ceased, or had been determined, and that some third party had, since

(*f*) Bac. Abr. CARRIERS, A.; 1 Wils. 281.

(*g*) *Jones v. Tyler*, 1 Ad. & E. 522.

(*h*) Reg. Gen. Hil. Term, 16 Vict. 1 Ell. & Bl. App. lxxx. lxxxii.

(*i*) *White v. Gt. Western Rail. Co.*, 2 C. B., N. S. 7.

(*k*) Ante, p. 226. *Cheesman v. Exall*, 6 Exch. 341.

the bailment, become entitled to the property, and had demanded it of the defendant (*l*).

If the defendant relies upon the Common Carriers' Act, he must by his plea show that the articles delivered to him for conveyance were of the description mentioned in the statute, and that at the time of the delivery of them to the defendant to be carried, the value and nature of the goods were not declared by the plaintiff (*m*).

Replication.—A replication, that the loss of which the plaintiff complains arose from the felonious acts of the carrier's servants, takes the case, as we have seen (*ante*, p. 315), out of the operation of the Carriers' Act (*n*).

Evidence at the trial—Proof on the part of the plaintiff—Proof of railway time-tables.—Railway companies are, as we have seen, bound by the statements and representations put forth by them in their published time-tables (*ante*, p. 305). In order to show that the time-table was issued by the authority of the company, it must be proved either that it was bought at one of the company's stations, or at one of their recognised receiving-offices, or that it was posted up in some office or place where the advertisements of the company were usually posted.

In order to establish a cause of action against a common carrier for refusing to receive passengers or goods, proof must be given of the exercise by him of the trade or calling of a common carrier of goods and passengers (*ante*, p. 304), that he had advertised, or by his course of dealing had holden out his vehicle as about to start for a particular destination, that the plaintiff tendered himself or his goods for conveyance, and was ready and willing to pay the customary fare or hire, that there was room in the common carrier's carriage, and that he refused to receive the plaintiff or his goods.

Proof of the bailment of goods to the common carrier.—To charge the common carrier for the loss of goods, however occasioned, it must of course be shown that the goods were either actually or constructively bailed to him or his servants to be carried. They must either have been delivered into his hands or into the hands of his servant or agent, or some person authorised by him to receive them. If they were merely deposited in the yard of an inn, or upon a wharf to which the carrier resorts, or were placed in his cart, vessel, or carriage, without his knowledge and acceptance or that of his servants or agents, there has of course been no bailment or delivery of the goods to him (*o*), and he cannot consequently be

(*l*) *Sheridan v. New Quay Co.*, 4 C. B., N. S. 618.

(*m*) *Pianciani v. Lond. & S. W. Rail. Co.*, 18 C. B. 229. *Hart v. Bazendale*, 6 Exch. 789; 21 Law, Exch. 123.

(*n*) *Metcalf v. Lond. & Br. Rail. Co.*, 27 Law, J., C. P. 205.

(*o*) *Selway v. Holloway*, 1 Raym. 48. *Buckman v. Levi*, 3 Campb. 414. *Lovett v. Hobbs*, 2 Show. 128.

made responsible for the loss of them. If the common carrier's servant has been induced by the consignor to depart from the usual course of dealing, and to receive goods which he was not bound to receive and carry under circumstances of hazard known to the consignor, but not disclosed to the carrier's servant, the carrier will not be responsible for the loss of the goods (*p*). If the consignor has made a private bargain with the driver of the cart or coach of the common carrier for the conveyance of a parcel for a gratuity which was not intended by the parties to find its way into the pocket of the carrier, there has been then no bailment to the latter, and he is not consequently liable in case the parcel is lost. The bailment in such a case is a bailment to the driver alone, and he alone is responsible for the loss (*q*).

If the plaintiff has merely hired the cart or carriage of the common carrier, and has sent his own servants with the goods to take charge of them, and there has been no actual delivery or bailment of the goods to the carrier, the latter is not responsible for their safety (*r*). If a passenger travelling on the outside of a stage-coach has kept a parcel or package in his own hands, and under his own care, or taken it with him into the interior of the vehicle, without the knowledge of the carrier or his servants, and the thing is lost, the carrier is not responsible for the loss, as the article was never delivered to him or to his servants, or in any way intrusted to his or their keeping. But if the thing has been tendered to the carrier for conveyance, and the latter has directed the passenger to place it in or upon any portion of the vehicle, there has been a constructive bailment or delivery and acceptance of the goods, so as to charge the carrier for the loss of them. If luggage is placed with the knowledge of the carrier or his servants under the seat on which the passenger sits, the carrier will be responsible for its safe conveyance and delivery to the passenger at the place of destination (*s*). A delivery of goods to a person sent or appointed by the carrier to receive them, is of course a delivery to the carrier himself (*t*).

Proof of the goods having been carried under a special contract.—We have seen that every special contract, notice, or condition, respecting the acceptance and carriage of goods by railway and canal companies, must be signed by the party sought to be affected thereby (*ante*, pp. 316, 317); and the signature must be fairly obtained, for where a party who was unable to read was told by a clerk of the company that the paper was

(*p*) *Edwards v. Sherratt*, 1 East, 619.
Slim v. Gr. North Rail. Co., 23 Law, J.,
C. P. 166.

(*q*) *Butler v. Basing*, 2 C. & P. 613.
Bignold v. Waterhouse, 1 M. & S. 259.
Middleton v. Fowler, 1 Salk. 282.

(*r*) *East I. Co. v. Pullen*, 2 Str. 690.

(*s*) *Richards v. Lond. Bright. &c. Rail.
Co.*, 7 C. B. 848; 18 Law, J., C. P. 251;
ante, p. 322.

(*t*) *Syms v. Chaplin*, 5 Ad. & E. 634;
1 N. & P. 129.

a mere matter of form and of no consequence, and the party signed the paper relying upon this assurance, it was held that the paper so foisted upon him was not binding (u).

If the plaintiff has declared against the defendants as common carriers, alleging that they received the goods to be carried by them as common carriers, and it turns out that they were received under a special contract (ante, p. 317), the evidence will fail to support the declaration, unless it be shown that the special contract was unreasonable and void (x).

Proof of felony by a carrier's servants.—When, in consequence of the plaintiff's not having paid the extra price for lost articles of value, he is not entitled to recover, unless he shows that the things had been stolen by the carrier's servants, it is not enough for him to make out a probable case against some one or more of the carrier's servants. He must show that the things were lost under circumstances wholly inconsistent with their having been stolen by a stranger (y).

Proof of a jus tertii by a common carrier, under a plea that the goods delivered to him to be carried were not the property of the plaintiff.—A carrier who has received goods from a consignor is not estopped from denying the title of the latter to the goods. Common carriers are bound to receive goods properly tendered to them for carriage, and can make no inquiries into the ownership of them. "The law protects them against the real owner if they have delivered the goods in pursuance of their employment without notice of his claim. It ought equally to protect him against the pseudo owner, from whom they could not refuse to receive the goods in the event of the real owner claiming the goods, and their being given up to him. The compulsory character of the employment of a common carrier furnishes ample ground for so holding" (z).

Proof of non-delivery of goods by common carriers may be given either by the plaintiff himself or his servants, showing that the plaintiff is the person to whom the goods were addressed, and that he has never received them (a); and it is for the carrier to excuse himself, if he can, for the non-delivery (ante, pp. 319–324).

Damages recoverable from common carriers and common innkeepers for refusing to fulfil the duties of their several offices.—In all actions against common carriers for unlawfully refusing to receive and carry a passenger or goods, substantial damages are recoverable, as there is an injury to a

(u) *Simons v. Gt. West. Rail. Co.*, 2 C. B., N. S. 620.

(x) *White v. Gt. West. Rail. Co.*, 2 C. B., N. S. 17. *Latham v. Rutley*, 2 B. & C. 20.

(y) *Metcalf v. Lond. & Br. &c. Rail.*

Co., 27 Law, J., C. P. 333.

(z) *Sheridan v. New Quay Co.*, 4 C. B., N. S. 618; 28 Law, J., C. P. 58. *Cheesman v. Ezell*, 6 Exch. 341.

(a) As to the delivery of the goods, see ante, p. 319.

right; and if the plaintiff, in consequence of the wrongful refusal (b) of the common carrier to carry him, has been obliged to take a special conveyance, and incur extraordinary expenses to reach the place to which he ought to have been carried, all such expenses are recoverable, if claimed by the plaintiff, and specified in his declaration as part of the damage he has sustained.

If a common innkeeper unlawfully refuses to receive and provide accommodation for a traveller, substantial damages are recoverable for the injury done to the plaintiff's right as a traveller and wayfarer to have shelter and accommodation in the common inn; and if he has been put to expense in seeking shelter and accommodation elsewhere, and has been obliged to hire conveyances to reach it, he is entitled to go for and recover such special damage.

All persons are responsible for all the natural and legal consequences resulting from acts done by them in violation of the rights of others. The jury are entitled to look at all the surrounding circumstances, and at the conduct of the parties, to see where the blame is, and assess the damages according to the way in which the parties have conducted themselves (c).

Damages recoverable from common carriers and railway companies for loss of, or injury to, goods and chattels from negligence.—The amount of damages recoverable from common carriers for loss of, or injury to goods, is regulated and controlled by the several acts of parliament, requiring consignors in certain cases to declare the value of the article at the time it is delivered to the common carrier to be carried (ante, p. 311). No greater damages than 50*l.* are to be recovered for loss of, or injury to, a horse through the neglect or default of a railway company or its officers; 15*l.* per head for neat cattle; and 2*l.* per head for sheep and pigs; unless the person sending or delivering the animals to the company shall, at the time of delivery, have declared them to be of higher value (d).

Proof of the value and of the amount of injury lies in all cases upon the person claiming compensation.

If special circumstances exist which render the loss of the goods, or delay in the delivery of them, productive of more than ordinary injury and damage to the owner, those special circumstances ought to be communicated to the carrier at the time the goods are delivered to him, in order to make him responsible for the special and extraordinary damages in cases of non-delivery (e).

(b) Ante, pp. 14, 72; post, ch. 21.

(c) *Davis v. North West Rail. Co.*, 4 Jur. N. S. 1303; post, ch. 21.

(d) 17 & 18 Vict. c. 31, s. 7.

(e) *Hadley v. Baxendale*, 9 Exch. 364; 23 Law, J., Exch. 179. *Black v. Baxendale*, 1 ib. 410.

When the consignor has been guilty of no intentional deception to conceal the risk (ante, p. 809), and his own conduct or omission to declare the nature and value of the article has not in any way conduced to the loss, but the loss has been caused solely by the negligence and want of care of the common carrier, the latter is bound by the common law to make compensation for the loss so occasioned, to the extent, at all events, of the apparent and presumable value of the article at the time it was bailed to him to be carried. But he is not, it seems, responsible for any extraordinary or unusual value which may have accidentally been imparted to it, and which could not from the apparent nature and general character and appearance of the thing be fairly presumed to exist. Thus, where the plaintiff had put a 50*l.* bank-note into his carpet-bag amongst his linen and wearing apparel, and got on a coach and delivered the carpet-bag to the coachman, and on the arrival of the coach at its place of destination the bag was missed and never afterwards seen, the jury gave a verdict for the value of the linen and wearing apparel, but not for the value of the note, and the court afterwards refused to increase the verdict by the amount of the note (*f*). In other cases, however, the plaintiff has recovered the full value of the article lost (*g*).

It has been justly remarked by American jurists, that it is a principle of law that no person shall, by practising concealment or fraud, impose upon another a duty which the latter would not, if acting advisedly with full knowledge of the circumstances, have undertaken; and therefore, where one traveller put 11,250 dollars in his trunk, and another a large quantity of valuable merchandize, without giving any intimation to the coach-proprietor of the exceeding value of the contents of the trunks, and the trunks were lost, it was held that the value of the dollars and of the costly merchandize could not be recovered from the common carrier, as the latter was doubly wronged, first in being deprived of his just reward for carrying such property, and secondly in not having his attention drawn to the necessity of increased care and attention for its preservation (*h*).

(*f*) *Miles v. Cattle*, 4 M. & P. 630;
6 Bing. 743.

(*g*) *Sleat v. Fagg*, 5 B. & Ald. 342.

Walker v. Jackson, 10 M. & W. 161; 2
M. & P. 342.

(*h*) Angell on Carriers, § 262.

CHAPTER X.

OF WRONGFUL DISTRESS AND SALE OF THINGS DISTRAINED— DISTRESS FOR RENT—DISTRESS, DAMAGE FEASANT.

SECTION I.—*Of unlawful and excessive distresses.*—Distress for rent in arrear—Of conditions precedent to the right to distrain—Distress for rent payable in advance—Of the right to distrain after the termination of the term of hiring—Distress by agents, joint-tenants, tenants-in-common, &c.—Agreements not to distrain—Time, mode, and place of making a distress—Things distrainable and not distrainable—Distress of things fraudulently removed—What amounts to a distress for rent—Abuse of the right to distrain rendering parties trespassers *ab initio*—Unlawful distress for rent when no rent was in arrear—Excessive distresses—Distress for more rent than was due—Repeated distresses for the same rent—Impounding, appraise-

ment, and sale of things distrained—Tender of the rent before sale—Notice of distress—Effect of non-compliance with the requirements of the statute authorising the sale of things distrained.

SECTION II.—*Of distress, damage feasant.*—Seizure and impounding of chattels, damage feasant—What things may be distrained, damage feasant—Tender of amends—Sale of impounded animals to defray the cost of their food—Liabilities of pound-keepers.

SECTION III.—*Of actions for unlawful and excessive distresses.*—Replevin of things distrained—Actions for unlawfully selling impounded animals and cattle—Parties, pleadings, defences, and evidence—Damages recoverable.

SECTION I.

OF UNLAWFUL AND EXCESSIVE DISTRESSES—DISTRESS FOR RENT—DISTRESS, DAMAGE FEASANT.

Distress for rent in arrear.—By the common law, landlords to whom rent is due, and who are clothed with the immediate reversion of the premises out of which the rent issues, have the power of entering in person, or by deputy, upon the demised premises, and seizing the moveables and personal property thereon, with certain exceptions, and holding them as a pledge for the payment of the rent, and they have now by statute the power of selling the things distrained. This remedy by distress is said to have come to us from the civil law, where the land

farmed out to the tenant was hypothecated, or pledged in his hands to answer the rent agreed to be paid, the whole profits arising from the soil being liable to the lord's seizure (*i*).

It is essential to the lawful exercise of the power of distress, that the distrainer be the party entitled to the reversion of the premises distrained upon, on the determination of the existing tenancy (*j*). "If he has made a lease without having any right or title to grant a lease, or if, after the making of the lease, he has sold and transferred his estate or interest to some third party (*k*), or being himself only a lessee, he has assigned his lease, or if, after granting an under-lease, he has forfeited his estate by some breach of covenant or otherwise, and the superior landlord has entered, and the tenant has attorned to the latter, he has no right or power to distrain (*l*). It has been holden that a tenant from year to year underletting from year to year, has a reversion which enables him to distrain for rent reserved upon such underlease" (*m*).

If the lease has been put an end to by a surrender of the term, or by a notice to quit, and the tenant, notwithstanding the termination of the demise, continues to hold, with the permission of the landlord, as tenant-at-will, or adversely and against the will of the lord as a wrong-doer, the lessor has no power at common-law to distrain the goods and chattels of the tenant for rent in respect of such occupation (*n*). Neither can he distrain except under the statute of Anne (post, p. 349), for rent that accrued due before the determination of the lease. But any slight evidence of a renewal of the tenancy, and of an agreement to hold upon the former terms, would be sufficient to justify the landlord in distraining for the old rent (*o*).

If the tenant becomes bankrupt or insolvent, and the assignees decline to take the lease, the lessor is not, in case the bankrupt tenant continues to hold the property, deprived by the bankruptcy and certificate, or discharge, of his right to distrain (*p*). If a lessee, having granted an underlease, becomes bankrupt, such bankrupt lessee is not deprived by the bankruptcy of his right to distrain, unless the assignees have taken to the lease and discharged the bankrupt from the rent payable to the superior

(i) Gilbert on Rents, 5; on Distresses, 2.

(j) 8 & 9 Vict. c. 106, s. 9.

(k) *Parmenter v. Webber*, 8 Taunt. 593; 2 Moore, 656. *Preece v. Corrie*, 2 M. & P. 64; 5 Bing. 24; 5 M. & R. 157, 162. *Smith v. Mapleback*, 1 T. R. 441.

(l) *Burne v. Richardson*, 4 Taunt. 720. *Hopcroft v. Keys*, 2 M. & Sc. 700; 9 Bing. 618. *Langford v. Selmes*, 3 K. & J. 229.

(m) *Curtis v. Wheeler*, 1 M. & M. 403.

(n) *Jenner v. Clegg*, 1 M. & Rob. 213.

Aylford v. Vickery, 1 Car. & Marsh. 288.

(o) *Zouch v. Willingdale*, 1 H. Bl. 811.

Beavan v. Delahay, 1 H. & Bl. 8.

(p) *Briggs v. Sowry*, 8 M. & W. 729. *Newton v. Scott*, 9 M. & W. 434; 10 M. & W. 471. *Phillips v. Shervill*, 6 Q. B. 944; 14 Law, J., Q. B. 144. But the distress is not available for more than one year's rent accrued prior to the filing of the petition in insolvency, 12 & 13 Vict. c. 106, s. 129.

landlord (*q*). The power of distress is always subservient to prerogative process issued by the crown, such as an extent; and the sheriff may consequently take goods that have been distrained out of the hands of the landlord or his bailiff, and sell them for the benefit of the crown (*r*). A landlord, moreover, cannot distrain twice for the same rent, unless the distress has been withdrawn at the instance or request of the tenant, or unless there has been some mistake as to the value of the things taken. It is vexatious in a landlord to make repeated distresses unnecessarily (*s*).

When there is no certain ascertained rent there is no right to distrain.—If lands and houses have been demised together at one entire rent, and the lease is void as to part of the subject-matter of the demise and good for the residue, the lessor cannot distrain for the rent, as there is no distinct and ascertained rent fixed in respect of the part for which the lease is good (*t*). Where there was a lease of one hundred acres of land at an annual rent of 79*l.*, and eight of these acres were in the possession of another tenant under a prior demise, it was held that the lessor could not distrain for any part of the rent, as it was reserved in respect of the whole one hundred acres, and the rent was entire and unapportionable (*u*). But where a new agreement is come to providing for a specified reduction of rent, or for an ascertained and settled compensation in respect of the part held under the prior demise, such agreement may operate as a re-demise at an ascertained rent, recoverable by distress (*x*).

Where an oral agreement was entered into between the proprietor of a marl-pit and brick-mine, and a potter and brickmaker, upon the terms that the latter should pay 8*d.* per solid yard for all the marl that he got out of the marl-pit, and 1*s.* 8*d.* per thousand for all the bricks that he made from the brick-mine, by quarterly payments at the usual quarter days, and the brickmaker took possession of the pit and the mine, and dug marl and burnt bricks, and made several quarterly payments, it was held that this was a demise from year to year at a rent capable of being ascertained with certainty, and that the lessor, therefore, was entitled to distrain (*y*). And where land was holden upon the terms that the plaintiff should not sell hay off the demised premises under a penalty of 2*s.* 6*d.* a yard, to be recovered by distress as for rent in arrear, it was held that the penalty might be treated as a rent payable in respect of

(*q*) *Peskett v. Somers*, coram Wilde, C. J., Sittings after Hil. Term, 1850.

(*r*) *Rex v. Cotton*, Parker, 112.

(*s*) *Bagge v. Mawby*, 8 Exch. 849. *Dawson v. Cropp*, 1 C. B. 961.

(*t*) *Gardiner v. Williamson*, 2 B. & Ad. 339.

(*u*) *Neale v. Mackenzie*, 1 M. & W. 763.

(*x*) *Watson v. Waud*, 8 Exch. 335.

(*y*) *Daniel v. Gracie*, 6 Q. B. 145.

every sale made in breach of the agreement, that the amount due was capable of being ascertained with certainty, and might be recovered by distress (x).

If a tenant has entered into possession under an agreement which does not operate as a present demise at a fixed rent, but merely as an executory contract for a future lease afterwards to be granted, and the landlord neglects to grant the lease, and the tenant continues to occupy without paying any rent or making any absolute and unconditional admission of any specific sum being due as rent in respect of such occupation, the landlord has no right to distrain (a). But as soon as by payment of rent, or otherwise, a tenancy from year to year at a fixed rent can be implied, the landlord may distrain for all rent subsequently accruing due (b). And if the tenant, after he has taken possession, "promises to pay a rent certain, or settles it in account, the landlord will then have a right to distrain" (c).

Of conditions precedent to the right to distrain.—The right to distrain may be made conditional, or may be postponed by the contract of the parties (d). Where a lessee agreed to take, and the lessor to let, a house and premises at a yearly rent, payable quarterly, and the lessor agreed to complete the house, and fix a bresummer in the back front window, and allow the lessee 15*l.* towards ereeting an oven, and the lessee took possession and built the oven, but the lessor never completed the house nor fixed the bresummer, and the lessee refused payment of the rent, whereupon the lessor distrained, it was held that the distress was illegal, as the condition upon which the rent was to become due remained unaccomplished (e). And where an oral agreement was entered into for the letting and hiring of a house and furniture at an annual rent, payable quarterly, the house to be furnished completely, in a manner suitable to a ladies' school, and the lessee took possession, it was held that the furnishing of the house by the lessor in the manner agreed upon was a condition precedent to his right to distrain for the rent (f). Whenever a covenant or promise to pay rent is conditional and dependent, and the lessor is ready and willing to fulfil the condition on his part, but the lessee prevents him, the lessor will have his power of distress.

Distress for rent payable in advance—Rent when due—Several demises.
—Rent may be made payable in advance, so as to entitle the landlord to

(x) *Pollitt v. Forest*, 11 Q. B. 949; 5 Bing. 185.
16 Law, J., Q. B. 424.

(a) *Hegan v. Johnson*, 2 Taunt. 148.

(b) *McLeish v. Tate*, Cowp. 783.

(c) *Knight v. Bennett*, 11 Moore, 222;
3 Bing. 361. *Cox v. Bent*, 2 M. & P. 281;

(d) *Giles v. Spencer*, 3 C. B., N. S. 253;
26 Law, J., C. P. 237.

(e) *Regnart v. Porter*, 5 M. & P. 370.

(f) *Mechelen v. Wallace*, 7 Ad. & E.
54 n.

distrain for it at the commencement instead of at the end of each quarter (*g*). When there is a reservation of an annual rent, or a covenant, or agreement by a tenant to pay so much a-year, a stipulation for the determination of the tenancy at the expiration of any one quarter of a year, by a six or three months' notice, will not raise a presumption that the rent was to be paid quarterly (*h*). Where a landlord agreed to let a house at a yearly rent of 50*l.*, and likewise the stable and loft at a further rental of 25*l.* per annum, to be paid on the usual quarter days; it was held that this was a demise of two different sets of premises at separate rents, payable at different periods: that the 50*l.* rent was payable yearly, and the 25*l.* rent payable quarterly (*i*). Where a contract was entered into for the letting and hiring of a house for a year certain, at a rent payable quarterly, "or half-quarterly if required," and the tenant entered into possession, and paid his rent quarterly for the first year of the tenancy, at the expiration of which period the lessor, without any previous demand or notice to the tenant, distrained for half a quarter's rent then alleged to be due, it was held that the lessor had no right so to do without giving a previous intimation and notice to the tenant of his election to take the rent half-quarterly (*k*).

If the lessor distrains before the rent has become due, the tenant may resist the entry and seizure by force, and after a seizure has been made, he may rescue his goods at any time before they have been impounded; but when once the goods have been impounded, they are in the custody of the law, and the tenant cannot then break the pound and retake them (*l*).

Of the right to distrain after the termination of the term of hiring.—At common law the landlord could not, it seems, have distrained after the expiration of the term for rent that accrued due before the determination thereof, as his reversion was then gone, the entire estate being revested in him in possession (*m*); but now, by 8 Anne, c. 14, s. 6, 7, it is enacted, that it shall be lawful for him to distrain for arrears of rent due upon any lease ended or determined after the determination of the lease, in the same manner as he might have done if such lease had not been ended or determined; provided such distress be made within six calendar months after the determination of the lease, and during the continuance of the landlord's title or interest, and during the possession of the tenant from whom such arrears became due. Where a tenant went away, leaving

(*g*) *Lee v. Smith*, 9 Exch. 665.

(*h*) *Collett v. Curling*, 10 Q. B. 785;
16 Law, J., Q. B. 390.

(*i*) *Coomber v. Howard*, 1 C. B. 440.

(*k*) *Mallam v. Arden*, 3 M. & Sc. 795;

10 Bing. 299.

(*l*) 1 Inst. 47 b., 161 a.; Gilb. 61. *Ellis v. Taylor*, 8 M. & W. 415.

(*m*) *Williams v. Stiven*, 9 Q. B. 14; 15 Law, J., Q. B. 321.

behind him a cow and a few pigs, without asking permission to leave them, or saying when he was going to take them away, and the succeeding tenant entered and took possession, it was held that the lessor had no right to distrain the things so left, as the tenant was not then in the possession and occupation of the premises (*n*). The customary right of the tenant to an away-going crop always operates as a prolongation of the term as to the land on which the crop grows for the period allowed by the custom for getting in and gathering the crop. All the rights and properties belonging to the original contract are continued during the period in question, and among them the landlord's right to distrain. Therefore, where a part of the tenant's corn remained in a barn on the demised premises beyond the period of six calendar months, but within the term allowed by custom for the out-going tenant to get in and dispose of his crop, it was held that the corn might be distrained by the landlord (*o*).

If, by tacit consent of the landlord and tenant, the contract between them continues beyond the time for which they originally contracted, all the rights and properties belonging to the original contract are also continued, and among them the landlord's right to distrain. It has often been determined that if there be a lease, and after the determination of it the tenant holds over, with the consent of the landlord, he must hold upon the terms and liable to all the conditions and covenants of the lease (*p*). If after the determination of a tenancy by the expiration of a notice to quit the tenant holds over, and the landlord distrains for rent, the landlord thereby waives the notice, and affirms and continues the tenancy (*q*).

Distress by agents—Joint-tenants—Tenants-in-common, &c.—A mere receiver of rents (not being a receiver appointed by the Court of Chancery) has no power to distrain, although he may be authorised to collect and receive the rents for his own benefit (*r*). And when an agent or bailiff receives a special authority from the lessor to levy a distress upon the demised premises, the authority should be given and acted upon in the name of the lessor or reversioner. But if the agent distrains in his own name, and gives a notice in writing, stating the rent to be due to himself, he may, nevertheless, justify in the name and as the bailiff of the lessor (*s*). A receiver appointed by the Court of Chancery has a power of distress, and need not previously apply to the court for a particular order for that

(*n*) *Taylerson v. Peters*, 7 Ad. & E. 110; 2 N. & P. 622.

(*o*) *Beavan v. Delahay*, 1 H. Bl. 9. *Lewis v. Harris*, ib. 7 n. (*a*). *Nuttall v. Staunton*, 4 B. & C. 51.

(*p*) *Beavan v. Delahay*, 1 H. Bl. 9;

ante, p. 346.

(*q*) *Zouch v. Willingale*, 1 H. Bl. 311.

(*r*) *Ward v. Shew*, 2 M. & Sc. 766; 9 Bing. 608.

(*s*) *Trent v. Hunt*, 9 Exch. 14; 22 Law, J., Exch. 320.

purpose (t). One joint-owner or joint-reversioner may distrain alone, but he must avow and justify the taking of the distress in his own right, and as bailiff to the other (u). He may also sign a warrant of distress, and appoint a bailiff to distrain for rent due to all, unless the others expressly dissent (x). The same rule prevails in the case of co-parceners and co-heirs in gavelkind, any one of whom may avow and justify the distress in his own right, and make conuzance as the bailiff of the others without averring or showing any express authority from them to distrain (y). If one of several joint-tenants of the reversion to which the rent is incident conveys away all his estate and interest in the demised premises, the right to distrain for the rent is extinguished, for there can be no apportionment of the rent by the severance of the reversion (z).

Tenants-in-common who have several estates, and are severally entitled to the rent and the reversion of the demised premises, should make several distresses. They may, of course, authorise a bailiff to distrain on behalf of all, or one tenant-in-common may distrain on his own account, and as the bailiff and agent of the others, but they must avow and justify the taking of the distress separately in respect of their several shares (a). And one tenant-in-common may distrain for his own share of the rent, although the rent has been reserved in one sum payable to all generally, and not in several sums payable to each, and therefore, where a lessee holding under two tenants-in-common, at a yearly rent of 18*l.*, payable quarterly, received notice from one of them to pay to him a moiety of the rent as soon as it became due, and the lessee, notwithstanding such notice, paid the whole rent to the other tenant-in-common, it was held that the party who had thus given the notice might distrain upon the land for his moiety of the rent (b). Where fifty acres of arable land were demised by four persons (whose original title did not appear) at one entire rent of 94*l.* per annum, to be divided and paid to the four lessors separately in equal portions, it was held that as between themselves and the lessee they must be taken to be tenants-in-common of the reversion, and that one of the four was entitled to distrain for a fourth part of the rent independently of the rest (c).

Effect of an agreement not to distrain.—The right to distrain may be waived, abandoned, or postponed by the express contract or agreement of the landlord, for it is not an inseparable incident to a rent service (d). If,

(t) *Brandon v. Brandon*, 5 *Mad.* 473.
Bennett v. Robins, 5 *C. & P.* 379.

(u) *Pullen v. Palmer*, 5 *Mod.* 73, 150;
 3 *Salk.* 207.

(x) *Robinson v. Hoffman*, 1 *M. & P.*
 474; 4 *Bing.* 503; 3 *C. & P.* 234.

(y) *Leigh v. Shepherd*, 5 *Moore*, 207;
 2 *B. & B.* 465.

(z) *Staveley v. Allcock*, 16 *Q. B.* 636;
 20 *Law, J., Q. B.* 321.

(a) *Litt. sec.* 314–317.

(b) *Harrison v. Barnby*, 5 *T. R.* 246.

(c) *Whitley v. Roberts*, *M. Cl. & Y.*
 107.

(d) *Giles v. Spencer*, 3 *C. B., N. S.* 244;
 26 *Law, J., C. P.* 237.

therefore, a landlord has agreed with the owner of cattle not to distrain them if they are put into a particular close, and they are afterwards distrained there by the landlord, in violation of his agreement, an action for a trespass in taking the cattle is maintainable against him (e).

Effect on the right to distrain of the landlord's having taken a bill, or note, or security for the rent.—A landlord is not deprived of his right to distrain by the acceptance of a bill, or note, or security for the rent, unless it be proved that the landlord, at the time he accepted the security, bound himself not to distrain (f), or unless it be proved that the note was paid at maturity (g). If the landlord's receiver or bailiff relinquishes a distress on receiving a bill or note for the rent from the tenant, and pays over the amount of the note to the landlord, and the note is subsequently dishonoured, the landlord may return the money to the bailiff or treat it as an advance or loan from him, and distrain again for the unpaid rent (h).

Of the time, mode, and place of making a distress.—The tenant has the whole day on which the rent becomes due to pay such rent, and a distress therefore cannot be made until the day after the day appointed for the payment of the rent (i). A landlord or his bailiff cannot lawfully break open gates, or break down inclosures, or force open the outer door of any dwelling-house or building in order to make a distress (k), but he may draw a staple or undo fastenings which are ordinarily opened from the outside of the house (l). A distress, moreover, cannot be made in the night, or after sunset, or before sunrise (m); nor upon land which does not form part or parcel of the demise, and from which the rent reserved does not issue, unless the goods of the tenant have been removed thereto from the demised premises within sight of the lord coming to distrain, or unless they have been fraudulently removed thereto by the tenant to avoid the distress. If, therefore, a tenant enjoys an easement over, or a right to use, the land of a third party, and has, in the *bond fide* exercise of such right, placed his goods and chattels on the land of such third party, the lessor has no right to distrain them there. Thus, where a wharf on the banks of a tidal river was demised to a tenant at an annual rent, with a right to use part of the bed of the river, between high and low-water mark, as a place of deposit for boats and barges resorting to the wharf, it was held that the lessor of the wharf had no right to distrain the barges

(e) *Horsford v. Webster*, 1 C. M. & R. 699. *Welsh v. Rose*, 6 Bing. 638; 4 M. & P. 490.

(f) *Davis v. Gyde*, 2 Ad. & E. 626.

(g) *Harris v. Shipway*, Bull. N. P. 182 a.

(h) *Parrott v. Anderson*, 7 Exch. 98; 21 Law, J., Exch. 291.

(i) 21 Hen. 6, 40. *Duppa v. Mayo*, 1 Saund. 287.

(k) *Brown v. Glenn*, 16 Q. B. 254; 20 Law, J., Q. B. 205; 15 Jur. 289.

(l) *Ryan v. Shilcock*, 7 Exch. 72; 21 Law, J., Exch. 55; 15 Jur. 1200.

(m) Co. Litt. 142 a; Gilb. 50.

of the tenant lying on such land and bed of the river alongside the wharf, although they were attached to the wharf by head and stern-ropes, inasmuch as the land on which the barges were lying belonged to the crown, and had never been demised to the tenant (*n*). For the same reason a landlord could not, by the common law, distrain the beasts and cattle of a tenant feeding upon a common, and which had been placed there by the tenant in the *bond fide* exercise of a right of common vested in him in his own right, or as appurtenant to the land demised to him by the lessor. But this has been altered by 11 Geo. 2, c. 19, s. 8, which empowers landlords to take and seize, as a distress for arrears of rent, any cattle or stock of their tenants feeding or depasturing upon any common appendant or appurtenant.

Things not distrainable.—Tenants' fixtures annexed to the freehold by nails and permanent fastenings, such as furnaces, cauldrons, chimney-pieces, kitchen-ranges, stoves, coppers, grates, blinds, &c., are not distrainable, as they cannot be removed and restored without sustaining some injury (*o*). But if they are attached to the freehold by bolts and screws, so as to be moveable, they may be distrained and taken. Therefore cotton-spinning machines fixed to a wooden floor by screws, or soldered to a stone flooring, but fastened so as to be readily removeable, are distrainable (*p*). A millstone in a mill, and an anvil in the smith's shop, cannot be distrained for rent, although the anvil be removed out of the stock, or the millstone out of the socket to be picked, for the anvil is accounted part of the forge, and the millstone part of the mill, though it is not when taken actually affixed to the freehold (*q*).

By 51 Hen. 3, stat. 4, it is provided that no man of religion, nor other person, shall be distrained by his beasts that profit his land, nor by his sheep, by the king's or other bailiffs, so long as they can find other distress, or other chattels sufficient for the levying of the distress. Beasts of the plough are by common law exempt from distress; and to render other animals exempt on the ground that they profit the land, within 51 Hen. 3, st. 4, it is not enough to show that they are occasionally used in manuring the soil: it must be proved that they have been broken to harness, and are regularly employed in ploughing, harrowing, or drawing carts or waggons upon the farm, in the ordinary cultivation of the land. Heifers and steers, therefore, and young colts not broken to harness, are not "beasts that profit the land" within the meaning of the statute (*r*). Sheep, also, are exempt from distress at common law,

(*n*) *Buzard v. Capel*, 8 B. & C. 141; 3 M. & P. 494; 6 Bing. 150.

(*o*) *Co. Litt.* 47 b. *Pitt v. Shew*, 4 B. & Ald. 207. *Darby v. Harris*, 1 Q. B. 898. *Dalton v. Whitten*, 3 Q. B. 961.

(*p*) *Hellawell v. Eastwood*, 6 Exch. 309; 20 Law, J., Exch. 155.

(*q*) *Bro. Abr. DISTRESS*, pl. 23.

(*r*) *Keen v. Priest*, 32 Law, T. R., Exch. 131.

independently of the stat. 51 Hen. 3, so long as there are other distrainable chattels and animals, not being beasts of the plough, sufficient to satisfy the rent (*s*).

Implements of husbandry are also exempt from distress, and so are the tools and instruments of a man's trade or profession, such as the books of the scholar, the axe of the carpenter, the anvil of the smith, the stocking-loom of the weaver, the threshing-machine of the farmer, and the spade and axe of the labourer, so long as they are in actual use, or there are other goods on the demised premises sufficient to satisfy the rent without them (*t*). Wearing apparel, also, in actual use about the person of the wearer, is not distrainable, whether it be the wearing apparel of the tenant himself or of a guest in his house (*u*). The horse and goods of a guest at a common inn cannot be distrained for the rent of the inn, or its precincts, and this is a privilege allowed to inns for the security and protection of travellers.

Perishable articles, money, growing crops, fruit, &c., have always been considered to be unfit to be taken and detained as a pledge for rent, inasmuch as they are liable to a rapid deterioration, and cannot be restored to the tenant in as good plight as they were in when taken, within the period allowed by law for their redemption. Therefore, fruit, milk, the flesh of animals recently slaughtered (*x*), and other things of a perishable nature, could not be distrained; "but as the statute 2 W. & M. c. 5, s. 3, directs the distress to be sold within five days unless replevied, perhaps the ancient rule of the common law with respect to the perishable nature of the distress no longer extends, in the case of a distress for rent, to anything which is not liable to deterioration within the period prescribed by the statute for the sale of it. As the things distrained were regarded at common law in the light of a pledge, to be returned to the tenant when the rent was paid, it was held that money could not be distrained unless in a bag, because the identical pieces could not be known and restored; and that grain or flour could not be taken out of a sack, or hay from a barn, because it could not well be ascertained whether the identical quantity taken had been returned. Corn in the sheaf was not distrainable unless found in a cart. Growing corn, grass, fruits, hops, roots, and growing produce, also were not distrainable, as the crop was attached to the freehold, and could not be taken up and returned to the tenant, in case he chose to redeem the pledge, in the same state and condition as it was in when removed (*y*). But the acts of 2 W. & M.

(*s*) *Keen v. Priest*, 4 H. & N. 236; 28 Law, J., Exch. 157.

(*t*) *Simpson v. Hartopp*, Willes, 512.
Wood v. Clarke, 1 Cr. & J. 484. *Harvey v. Pocock*, 11 M. & W. 740; Co. Litt. 47 a.

Nargatt v. Nias, 28 Law, J., Q. B. 143.

(*u*) Bac. Abr. INNS, B.

(*x*) *Morley v. Pincombe*, 2 Exch. 101.

(*y*) 1 Rolle Abr. 667; Bradb. 213; Gilb. 32.

c. 2, s. 3, and 11 Geo. 2, c. 19, ss. 8 and 9, now enable the lessor to distrain loose corn and corn in the sheaf; straw and hay, growing corn, grass, hops, roots, fruits, pulse, and growing produce generally. These acts, however, do not extend to trees, shrubs, and plants growing in nursery gardens, nor to money (x).

Property of strangers on the demised premises in their own possession not distrainable.—The goods and chattels of strangers standing on the demised premises in the actual or constructive possession of the owners are not distrainable. The landlord has no right, for example, to distrain the carriage and horses of a morning visitor standing at the door of the tenant's dwelling-house, or under a shed upon the demised premises; or the horse of a stranger who has called at the house on business, and tied up the animal to the gate or the stable-door. He cannot distrain a horse which has brought corn to be ground at the tenant's mill, and has been fastened to the mill-door whilst the corn was being ground to be taken back, nor a horse which has brought yarn to a private beam belonging to the tenant to be weighed, and has been placed in a stable on the demised premises whilst the weighing was accomplished; the horse in each of these cases being in the possession and use, and under the control, of the owner or his servant (a). Neither can the landlord distrain the boat or barge of a third party lying in a private dock or private canal, or alongside a wharf upon the demised premises, provided such boat or barge is in the hands and under the care of the master and crew of the owner, and is at the time employed in the owner's business, and is in his use and possession, and not in the use and possession nor under the control of the tenant; but if it is abandoned and left upon the premises, in the possession or use, or under the care of the tenant or his servants, then it is distrainable (b).

The goods and chattels and wearing apparel of a guest in the tenant's house, in the actual possession and use of such guest, cannot be distrained for rent, whether the house in which the guest is lodged is a private dwelling-house or a common inn; nor the goods and chattels of third parties placed upon the demised premises, in the possession and under the care of the tenant, in the ordinary course of trade; nor the goods and chattels, horses and carriages of travellers, deposited in hostleries and public stables, or in a market or fair where things are taken to be bought or sold; nor goods delivered to a carrier to be carried for hire. The horse in the smith's shop shall not be distrained for the rent issuing out of the shop, nor the horse, &c. in the hostelry, nor the

(x) *Clark v. Gaskarth*, 2 Moore, 401.(a) *Read v. Burley*, Cro. Eliz. 596.(b) *Muspratt v. Gregory*, 3 M. & W. 677.

materials in the weaver's shop for the making of cloth, or cloth or garments at a tailor's, nor sacks of corn, nor meal in a mill, nor in a market, for it is in custody (protection) of law (c).

Property of strangers placed on the demised premises, with the leave and license of the landlord, is not distrainable. If, for example, the landlord's permission to place cattle on the demised premises has been sought for and obtained, and the beasts are placed thereon with his authority, he is held impliedly to have undertaken not to exercise his power of distress as against them (d).

Property of strangers placed on the demised premises to be manufactured or worked upon, not distrainable.—The goods and chattels of third parties placed on the demised premises for trading or manufacturing purposes are, by the policy of the law, exempt from distress; such as the yarn of a stocking-manufacturer, placed in the house of the tenant, a stocking-weaver, to be woven into stockings, but not the frame or machinery of the manufacturer, delivered to the weaver to enable him to weave the yarn (e); also the silk of a velvet-manufacturer, delivered to a tenant, a silk-weaver, and taken home by him to be made into velvet at his own house (f); bullocks sent to a slaughterer, or carcase-butcher, to be slaughtered and cut up in the way of his trade, and sent back in joints to the owner to be sold or consumed (g); corn sent to a miller to be ground; old clothes sent to a tailor's; casks sent to a cooper's, or boats to a boat-builder, to be repaired; goods sent to a weigher to be weighed, or to an auctioneer, commission-agent, factor, warehouseman, granary-keeper, wharfinger, or other agent, to be sold or exported, or otherwise to be dealt with in the course of trade (h). "The principle of the exemption," observes Parke, B., "is the publick good; that is, that all men may freely, and without interruption or danger of the loss of their goods, deal with those who carry on trades or businesses for the benefit of all indiscriminately; or buy or sell in markets or fairs, and thus supply themselves with the commodities of life" (i).

Chattels of traders left on the demised premises in the possession of the tenant distrainable for rent.—If a trade can be carried on with profit and advantage, without the things used in the trade being left on the demised premises in the custody and possession of the tenant, they are not there

(c) 7 Hen. 7, 1 b; Bro. Abr. DISTRESS, pl. 57, 71; 1 Roll. Abr. 688, pl. 12; Co. Litt. 47 a. *Gisbourn v. Hurst*, 1 Salk. 249.

(d) *Joyce v. Fowkes*, 2 Vern. 129. *Horsford v. Webster*, 1 C. M. & R. 696. *Giles v. Spencer*, 3 C. B., N. S. 253.

(e) *Wood v. Clarke*, 1 Cr. & J. 484.

(f) *Gibson v. Ireson*, 3 Q. B. 39.

(g) *Brown v. Shevill*, 2 Ad. & E. 138.

(h) Bac. Abr. DISTRESS, B. *Williams v. Holmes*, 8 Exch. 861. *Adams v. Crane*, 1 C. & M. 380. *Brown v. Arundel*, 10 C. B. 54. *Gilman v. Elton*, 6 Moore, 243. *Thompson v. Mashiter*, 8 Moore, 254. *Matthias v. Menard*, 2 C. & P. 358.

(i) *Joule v. Jackson*, 7 M. & W. 451.

ex necessitate, and are consequently distrainable. Thus it has been held that if a brewer's casks be left with a publican until the beer is consumed, the casks do not fall within the exemption, and are not privileged from distress, inasmuch as it is nowise essential to the carrying on the trade of the publican that the brewer should find the casks (*k*). So, if the barge of a purchaser of salt is left at the salt-works in the possession of the vendor of the salt, it is distrainable for rent, inasmuch as "it is not necessary for the protection of trade that the boat should be delivered into the custody of the person manufacturing and selling salt. The trade may well be carried on at the salt-works without the possession of the boat being at all parted with by the owner." Upon the same principle it has been holden that a farmer's cart which has brought malt to a brewer, and has been left in the brewer's yard in the possession of the brewer, or his servant, to be loaded with a return cargo of grains, or beer, is distrainable for the rent of the brewing premises (*l*).

If a carriage which has been sent to a coach-maker to be repaired is left on the premises after the repairs have been completed, for purposes foreign to the trade of a coach-maker, it is distrainable, unless the coach-maker exercises some other trade thereon, and the carriage is left with him for the purpose of being dealt with by him in the exercise of such trade. If he exercises the trade of a commission-agent for the sale of coaches and carriages, as well as the trade of a coach-maker, and the carriage is left with him to be sold, it would then come within the principle of the exemption (*m*). It has been held that a carriage standing at livery is distrainable (*n*). Whenever a chattel, such as a threshing-machine, or a loom, found upon the demised premises, has been lent or let by the owner to the tenant, it is distrainable, if it is not in actual use at the time of the levying of the distress (*o*). There is a decision to the effect that cattle on their way to market in charge of a drover, and turned into a close on the demised premises in the night, are distrainable (*p*); but this decision appears to be directly at variance with numerous authorities, and with the principles established for the benefit of trade, and cannot now be considered law (*q*).

Things distrainable.—With the exception of fixtures, perishable articles, and things used in trade or placed on the demised premises for trading or manufacturing purposes, or standing there in the custody or possession of the owner, as previously mentioned (*ante*, p. 355), all the goods and

(*k*) *Joule v. Jackson*, 7 M. & W. 451.

(*l*) *Muspratt v. Gregory*, 3 M. & W. 677.

(*m*) *Findon v. M'Laren*, 6 Q. B. 891.

(*n*) *Francis v. Wyatt*, 3 Burr. 1498; 1 W. Bl. 483. *Parsons v. Gingell*, 4 C. B. 545.

(*o*) *Fenton v. Logan*, 3 M. & Sc. 82. *Gorton v. Falkner*, 4 T. R. 565.

(*p*) *Fowkes v. Joyce*, 3 Lev. 260; 2 Vent. 50.

(*q*) *Tate v. Glead*, 2 Saund. 290 a.

chattels on the demised premises, whether they belong to the tenant himself or to strangers who have placed them in the custody or possession of the tenant, are distrainable for the rent due from such premises. This is the case with the horses and carriages of strangers standing at livery on the demised premises, and not being at the time of the distress under the charge or in the possession of the owner or his servants (*r*).

Distress of growing crops and corn.—By 2 W. & M. c. 5, s. 3, and 11 Geo. 2, c. 19, ss. 8, 9, landlords are enabled to distrain loose corn and corn in the sheaf, straw and hay, growing corn, grass, hops, roots, fruits, pulse, and growing produce generally. These acts, however, do not extend to trees, shrubs, and plants growing in nursery-gardens, nor to money (*s*). And, by 14 & 15 Vict. c. 25, s. 2, it is enacted, that in case growing crops are seized and sold by the sheriff or other officer, under an execution, such crops, so long as the same shall remain on the land, shall, in default of sufficient distress of the goods and chattels of the tenant, be liable to the rent which may become due after any such seizure and sale, and to the remedies by distress for the recovery of such rent, notwithstanding any sale or assignment which may have been made or executed of such growing crops by any such sheriff or other officer.

Distress of chattels mortgaged by the tenant.—Where a tenant from whom rent was due assigned all his goods and chattels by a registered bill of sale by way of mortgage, and was left in possession of the mortgaged chattels, and the landlord distrained them for rent, and caused them to be appraised, and removed to an auction-room to be sold, and the mortgagee, before the sale, and whilst the goods were in the custody of the law, gave notice to the landlord of the mortgage, and required the landlord to deliver to him, the mortgagee, any goods that might remain after the landlord had sold enough to satisfy the distress and costs, and the landlord promised so to do, and part of the goods remained unsold, and the landlord carried them back to the demised premises and returned them to the custody and possession of his tenant, from whom he took them, taking no heed of the notice given him by the mortgagee or of his promise to return the goods to the latter, it was held that the landlord was not liable to an action at the suit of the mortgagee, as it did not appear that he had been guilty of any tortious act, or that the mortgagee had sustained any damage in respect of the removal of those goods which had been taken away from and returned to the mortgagor, in whose possession the mortgagee had left them, and which were as much subject to the provisions of the bill of sale after their return as they had been before they were taken away (*t*).

(*r*) *Parsons v. Gingsell*, 4 C. B. 545; 16 20 Law, J., Exch. 155.
Law, J., C. P. 280.

(*s*) *Hellawell v. Eastwood*, 6 Exch. 309; 27 Law, J., Exch. 50.

(*t*) *Evans v. Wright*, 2 H. & N. 527;

If, after the tenant has mortgaged the goods and chattels on the demised premises, the mortgagee enters and takes possession, and the tenant becomes bankrupt, owing more than a year's rent, and the landlord distrains, he is entitled to make the distress available for the whole rent due to him, as the Bankrupt Act was never intended to favour the mortgagee at the expense of the landlord (u).

Of the landlord's right to distrain the goods and chattels of a judgment debtor against whom a fi. fa. has issued and been lodged in the hands of the sheriff—Chattels in the custody of the law not distrainable.—Goods and chattels which have been actually seized upon a fi. fa. or taken under an attachment, and are in the possession of a sheriff's officer or bailiff, cannot be distrained for rent, as they are in the custody of the law (x); but if the landlord is beforehand with the sheriff, and puts in a distress before the sheriff's officer has got possession, the sheriff cannot then seize them. The landlord is entitled to distrain for six years' arrears of rent (y), and if he gets possession before the sheriff he is entitled to retain and sell, and satisfy the whole six years' arrears if they be due.

If growing crops have been taken in execution and sold by the sheriff, such crops, as long as they remain on the demised premises, are liable to be distrained for rent accruing due subsequently to the execution and sale (14 & 15 Vict. s. 1), in default of sufficient distress of the goods and chattels of the tenant; and if the execution is fraudulent (z), or the sheriff's officer, after the seizure of the goods, relinquishes the possession, and leaves no one in possession of them, then they may be distrained and taken (a).

The landlord is entitled, in some cases to a year's rent, and in other cases to four weeks' arrears of rent, before goods taken in execution by the sheriff or the officers of the county court can be removed from the premises (b).

Statutory exemption from distress in favour of foreign ambassadors.—It has been enacted and declared by 7 Anne, c. 12, s. 3, on grounds of public policy, that process of distress against the goods of any ambassador, or other public minister of a foreign state, or of his domestic servants, shall be void.

Things distrainable under a license to distrain or a power of distress.—If a debtor gives his creditor a license to enter upon the debtor's land and distrain all the goods and chattels upon the debtor's premises, and sell

(u) *Brocklehurst v. Lane*, 7 Ell. & Bl. 185; 26 Law, J., Q. B. 107.

(x) *Wharton v. Naylor*, 12 Q. B. 673.

(y) *Humfrey v. Gery*, 7 C. B. 567.

(z) *Smith v. Russell*, 8 Taunt. 400.

St. John's Coll. v. Murcott, 7 T. R. 263.

(a) *Blades v. Arundale*, 1 M. & S. 713.

(b) As to this, and as to Distress by Bailiffs of the County Court, see post, ch. 13, s. 1.

them in satisfaction and discharge of the debt, this will not enable the creditor to seize and sell the property of a stranger, for a license of this sort cannot be made to extend to and to bind those who are not parties to it (c). If, therefore, the occupier of a farm borrows money, and binds himself to pay interest, and covenants that if the interest should be in arrear for a certain time, the covenantee shall have power to enter upon the farm and distrain for the arrears in the same manner as landlords may distrain for rent: this will be a license to the covenantee to enter and seize all the goods on the premises then belonging to the covenantor, but will not enable him to take the goods of a stranger (d).

The grantee of a rent-charge, with power of distress, may justify the taking corn, &c. in a stack or in trusses, under the statute 2 Wm. and Mary, sess. 1, c. 5 (ante, p. 358), in the same way as a landlord under a distress for rent; also the taking of the goods of a stranger on the premises charged with the rent. If the plaintiff whose goods have been taken held under a demise prior to the rent-charge, he ought to reply that fact (e).

Distress and seizure of goods fraudulently removed to prevent a distress for rent.—By 11 Geo. 2, c. 19, s. 1, it is enacted, that if any tenant of any lands or tenements upon the demise or holding whereof any rent is reserved, shall fraudulently or clandestinely convey away from the demised premises his goods or chattels, to prevent the landlord from distraining for arrears of rent, it shall be lawful for the landlord, or any person by him for that purpose lawfully empowered, within thirty days next ensuing the carrying away of the goods, to seize the same wherever they shall be found, as a distress for the rent, and sell and dispose of them as if they had been actually distrained upon the demised premises, provided (s. 2) they have not, before the seizure, been sold *bond fide* and for a valuable consideration to a person ignorant of the fraud.

Where the goods have been placed in any building or enclosure locked or fastened, the landlord, his bailiff or agent, first calling to his assistance a constable or peace-officer, &c., may in the daytime break open the building and seize the goods; but, before breaking open a dwelling-house, oath must be made (s. 7), before a justice of the peace, that there is reasonable ground to suspect that such goods and chattels are in the dwelling-house (f).

If it appears that rent was due at the time of the removal of the goods, and that the goods were taken away on or after the day the rent became due, for the purpose of putting them out of reach of a distress,

(c) *Howes v. Ball*, 7 B. & C. 481.

(d) *Freeman v. Edwards*, 2 Exch. 739.

(e) *Johnson v. Faulkner*, 2 Q. B. 936.

(f) As to pleas of justification of the seizure of goods under this statute, *Williams v. Roberts*, 7 Exch. 629.

the removal is a fraudulent removal within the meaning of the statute (*g*). If, therefore, goods are removed on quarter-day, they may be followed though the rent is not in arrear, and there is no right to distrain until the day after (*h*). But if the rent is not due, or there is sufficient distress on the demised premises, independently of the goods removed, to satisfy the rent, the removal is not fraudulent, and the lessor cannot consequently follow and distrain the goods (*i*). The statute applies solely to the goods of a tenant. If, therefore, a lodger removes his goods to prevent them from being distrained for rent due from the tenant, the landlord cannot follow them and distrain them (*k*). To deter tenants from fraudulently removing their goods to avoid a distress, a penalty to the amount of double the value of the things distrained is imposed upon the offender, which may be recovered by an action of debt or (if the goods do not exceed 50*l.* in value), by a summary proceeding before two justices (*l*).

What amounts to a distress for rent.—It is not necessary, in order to make a distress for rent, that the lessor or his agent should take corporal possession of the things intended to be distrained. It is sufficient if the lessor, in person or by deputy, enters upon the demised premises and announces to the tenant, or his servants, or the persons in actual occupation of the property, that he detains them for his rent. Thus, when a stranger was about to remove some goods he had deposited on the demised premises, and the lessor, hearing of his intention, came upon the land and declared that he would not suffer the things to be removed until his rent was paid, and then went away, and in the course of the day sent a broker who made a formal distress, but in the mean time the stranger had removed his property off the demised premises, it was held that the distress was commenced by the landlord's entry and declaration, and that the landlord was justified in re-taking the goods at the place to which they had been removed (*m*). So where the landlord's agent entered upon the demised premises in the absence of the tenant, and told the servants of the latter that he was come to distrain for rent, and walked round the premises, took an inventory, and left his inventory at the dwelling-house, with a notice of distress addressed to the tenant, informing him that he had distrained the goods mentioned in the inventory for rent due to his landlord, it was held that the distress was completed and accomplished by these acts of the agent, and that the subsequent departure of the latter without leaving any one in possession of the things distrained was not an

(*g*) *Opperman v. Smith*, 4 D. & R. 33.
John v. Jenkins, 1 Cr. & M. 227.

(*h*) *Dibble v. Bowater*, 2 Ell. & Bl. 564.

(*i*) *Rand v. Vaughan*, 1 Sc. 670.

(*k*) *Thornton v. Adams*, 5 M. & S. 38.

(*l*) *Horsefall v. Davy*, 1 Stark. 169.
Bromley v. Holden, Mood. & Malk. 175.

Bach v. Meats, 5 M. & S. 200.

(*m*) *Wood v. Nunn*, 2 M. & P. 30; 5 Bing. 10.

abandonment of the distress (n). And where the agent of the lessor went into a field forming part of the demised premises, where the tenant's cattle were grazing, and placing his hand upon one of the beasts, declared that he distrained the whole of them for the rent then due, it was held that this was an actual levying of a distress on all the cattle in that particular inclosure (o).

If a warehouse-keeper, who lets out warehouse-room and places of deposit for goods, or receives goods to be warehoused and kept at a certain rent, and has power to distrain the goods in his hands for the warehouse-rent, gives notice to the owner of the goods that he will not deliver certain goods in his warehouse to the order of the latter until the rent due for warehouse-room is paid, and then detains the goods, the detainer and notice amount to a distress for the rent (p). Where a lodging-house-keeper, to whom rent was due for the hire of furnished apartments, refused to permit the wearing apparel, jewels, and chattels of his tenant to be removed from the apartments, saying that he should detain them until his rent was paid, and the tenant brought an action against him for a conversion of the chattels, it was held that the detainer amounted to a distress for rent, and that the action was not maintainable (q). And where a lodging-house-keeper, claiming rent to be due to him from his lodger, locked up the goods of the latter in the room which the lodger held, and in which they had been placed by him, and kept the key in his pocket, refusing the lodger access to them, saying that nothing should be removed until his bill was paid, and the lodger brought an action of trespass for a seizure of the goods, it was held that the action was not maintainable (r).

Where a seizure of a chattel, lawful in the first instance, is rendered unlawful by the subsequent misconduct of the defendant or his bailiff.—Where a bailiff of a lord of a manor justified the taking of a horse as an estray, and the plaintiff replied that the defendant worked the horse after he had taken it, it was held that the user of the horse by the bailiff made him a trespasser ab initio (s), for if a man abuse an authority given him by law, he becomes a trespasser ab initio; but by stat. 11 Geo. 2, c. 19, s. 19, it is enacted, that where any distress shall be made for any rent justly due, and any irregularity or unlawful act shall be afterwards done by the party distraining, or his agent, the distress shall not be deemed unlawful, nor the distrainer a trespasser ab initio; but the party grieved may recover

(n) *Swann v. Earl Falmouth*, 8 B. & C. 456; 2 M. & R. 534.

(o) *Thomas v. Harries*, 1 Sc. N. R. 524.

(p) *Green v. St. Cath. Dock Co.*, 19 Law, J., Q. B. 53.

(q) *Cotton v. Bull*, Easter Term 1857. C. P.

(r) *Hartley v. Moxham*, 3 Q. B. 701.

(s) *Oxley v. Watts*, 1 T. R. 12. *Sir Carpenters' case*, 9 Co. 146 a.

satisfaction for the damage in a special action of trespass, or on the case, at the election of the plaintiff, and if he recover he shall have full costs.

Of unlawful distresses for rent when no rent was in arrear or due.—If the lessor distrains before the rent has become due, the tenant may resist the entry and seizure by force, and, after a seizure has been made, he may rescue his goods at any time before they are impounded; but when once the goods have been impounded, they are in the custody of the law, and the tenant cannot then break the pound and retake them (*t*). By the stat. 2 Wm. & Mary, sess. 1, c. 5, s. 5, it is enacted, that if any person shall distrain for rent pretended to be due or in arrear when no rent was due, the party so distraining shall forfeit double the value of the chattels so distrained and sold, together with full costs of suit (post, ch. 21).

Of excessive distresses.—By the stat. of Marlbridge, c. 4, it is enacted, that distresses shall be reasonable and not too great; and that he that taketh great and unreasonable distresses shall be grievously amerced for the excess of such distresses. Lord Coke, in his reading on this statute, observes, that it is worthy of observation “how provident the makers of the statute be that men’s beasts, cattell, or goods be not excessively distrained,” and that “this agreeth with the reason of the common law” (*u*). It is the duty, therefore, of every person who has by law a right to distrain, to make a fair and reasonable distress; and if there be a breach of that duty, and the landlord distrains goods and chattels beyond what is reasonably and fairly necessary for the purpose of realizing the rent and expenses, he renders himself liable to an action for damages at the suit of the lessee. If he distrains the crops growing in two fields, when the crop growing in one would be sufficient when at maturity to satisfy the rent and charges, the distress is an excessive distress (*x*). But it is not for every trifling excess that an action is maintainable; it must be clearly disproportionable and excessive (*y*). And “if there is but one thing which can be taken, so that it must be taken or the party must go without his distress for taking it, no action lies, though it much exceeds the sum for which the distress is taken” (*z*). The action may be brought by a lodger or under-tenant whose goods have been taken, as well as by the lessee himself (*a*); and if the lessee, after the distress, enters into an agreement with the landlord respecting the sale and disposition of such distress, or authorizes him to dispense with some or all of the usual forms preparatory to a sale, he does not thereby waive or abandon his right of

(*t*) Gilb. 61.

(*u*) 2 Inst. c. 4, p. 107; 52 Hen. 3, c. 4.

(*x*) 52 Hen. 3, c. 4. *Piggott v. Birtles*, 1 M. & W. 441.

(*y*) *Roden v. Eytton*, 6 C. B. 430.

(*z*) *Field v. Mitchell*, 6 Esp. 71.

(*a*) *Fisher v. Algar*, 2 C. & P. 374. *Bail v. Mellor*, 19 Law, J., Exch. 279.

action for the excessive distress (b). The tenant is entitled to recover damages for a wrongful distress, although he had the free use of the goods all the time they were in the constructive custody of the law (c).

Distress for more rent than is due.—If a landlord who has distrained, not excessively, for rent in arrear demands a larger sum for arrears than the tenant admits to be due, that alone does not make the detention of the goods by the landlord or his bailiff unlawful. The tenant must be taken to know, that neither the validity of the distress nor of the detainer depends on that demand, and that if he wishes to make the latter unlawful he should tender the sum which he alleges to be really due, together with the costs of the distress (d). A declaration, therefore, which alleges that the plaintiff held certain premises as tenant to the defendant at a certain rent, and that the defendant wrongfully seized certain goods of the plaintiff on the demised premises for certain arrears of rent alleged to be due, and afterwards sold the goods for the said arrears, whereas a small part only of the rent claimed to be due was due, discloses no cause of action in the absence of an allegation that the defendant sold more than was enough to satisfy the rent actually due and the costs of the distress (e). The distraining of chattels on a claim of more rent being in arrear than is in fact in arrear, and selling them, is not actionable; firstly, because the distrainor for rent is not bound by the amount for which he claims to distrain, and though he takes the distress, alleging that he does so for an amount exceeding the real arrears of rent, he may sell afterwards only for that which is really due; secondly, because, from a mere allegation that the distrainor sold for the alleged arrears and costs, it is not to be inferred that he sold more than was necessary to raise the amount of the arrears actually due. If, however, the untrue claim has been followed by a sale of more of the goods taken than was sufficient to raise the amount of rent really in arrear with the legal charges, then there is a cause of action. It is not enough in an action against a landlord for distraining for more rent than is really due to allege it to have been done maliciously, for an act which does not amount to a legal injury cannot be actionable because it is done with a bad intent (f).

Whenever goods have been seized as a distress for rent, and a tender is made of a sum sufficient to cover the rent actually due, and the costs of the distress up to the time of the tender, and the bailiff refuses to give up the goods, and the tenant is obliged to pay a larger sum to get back his

(b) *Willoughby v. Marshall*, 4 D. & R. 539; 2 B. & C. 821.

(c) *Baylis v. Usher*, 4 M. & P. 790.

(d) *Glynn v. Thomas*, 11 Exch. 870; 25 Law, J., Exch. 127.

(e) *Tancred v. Leyland*, 16 Q. B. 669. *French v. Phillips*, 26 Law, J., Exch. 82. 1 H. & N. 564.

(f) *Stevenson v. Newnham*, 13 C. B. 297; 22 Law, J., C. P. 110.

goods, he is entitled to an action for damages (*g*). But if the landlord distrains for a larger sum than is due, but not excessively, the tenant should tender the amount really due, if he wishes to make the détention of the goods unlawful (*h*). If no tender is made, but more goods are sold, and a greater amount realized by the sale than is sufficient to satisfy the rent really due with the legal charges, an action is maintainable for an excessive distress, or for distraining and selling for more rent than was due (*i*).

Repeated distresses for the same rent.—A landlord cannot lawfully distrain twice for the same rent, unless the distress has been withdrawn at the instance of the tenant, or unless there has been some mistake as to the value of the things taken (*k*), or unless the distress has been rendered abortive by the threats or misconduct of the tenant. If after a sale of chattels that have been distrained and sold in due course of law, the tenant by force or threats prevents the purchaser from taking the chattels off the land, the landlord may re-enter and distrain again (*l*). And if the landlord's receiver or bailiff relinquishes a distress on receiving a bill or note for the rent from the tenant, and the note is dishonoured when it arrives at maturity, the landlord may, as we have seen, distrain again (*m*).

Impounding the goods—Pound-breach.—The landlord may now impound the things distrained in any barn or building, hovel or rick, or on any fit part of the demised premises (*n*). No formal impounding is required as in ancient times, in order to remove the goods from the possession and control of the tenant, and place them in the custody of the law. As soon as the distrainor has made out and delivered to the tenant, or has left upon the premises, an inventory of the goods he has taken, they are impounded within the meaning of the statute. Thus, where the landlord distrained four casks of beer in a cellar, and gave the usual notice of the distress to the tenant, and left the casks where he found them in the cellar, without placing them under lock or key, or leaving any person in charge of them, it was held that the casks were duly impounded (*o*). So where cattle which had been distrained for rent were left in a field on a farm where they were taken, and the gates of the field, which had been properly secured by the broker who levied the distress, were opened, and

(*g*) *Loring v. Warburton*, 28 Law, J., Q. B. 81. *Johnson v. Upham*, ib. 252.

(*h*) *Glynn v. Thomas*, 11 Exch. 878.

(*i*) *French v. Phillips*, 1 H. & N. 567.

(*k*) *Bagge v. Mauby*, 8 Exch. 649. *Dawson v. Cropp*, 1 C. B. 961.

(*l*) *Lee v. Cooke*, 2 H. & N. 584; 3 H.

& N. 203; 27 Law, J., Exch. 337.

(*m*) *Parrott v. Anderson*, 7 Exch. 93; 21 Law, J., Exch. 291.

(*n*) 2 Wm. & M. sess. 1, c. 5; 11 Geo. 2, c. 19, s. 10.

(*o*) *Firth v. Purvis*, 5 T. R. 432.

the beasts taken out and driven away, it was held that this was a pound-breach, rendering the party who committed the act liable to treble damages under the statute (*p*). And if the distrainer enters and makes a general announcement of the distress on one day, and follows up the proceeding on the next, by giving the tenant notice of the particular things distrained and taken, the impounding is complete at all events from the time of such notice (*q*).

Formerly the distrainer, in removing the goods distrained, might have removed them to any place he thought fit for the purpose of impounding them, but the statute of Marlbridge (1 & 2 Ph. & M. c. 12, s. 1) prohibits the distrainer from driving the distress out of the hundred, rape, wapentake, or lathe in which it has been taken, except it be to a pound-overt within the same shire, not above three miles distant from the place where such distress was taken, and enacts that no cattle or goods distrained shall be impounded in several places, whereby the owner shall be constrained to sue several replevies for the delivery of the distress so taken at one time. If the distrainer uses or consumes for his own private use things distrained and impounded; if he draws beer out of a barrel (*r*), tans hides, or uses or works beasts or cattle; he of course subjects himself to an action for damages at the suit of the owner thereof (*s*). As soon as the goods are impounded they are in the custody of the law, and the tenant cannot retake them without being guilty of pound-breach, and subjecting himself to an indictment (*t*), and also to an action for treble damages and costs of suit, although the distress may be wrongful or irregular, and no rent may be in arrear or due (*u*). If the pound is broken, and the goods are taken away, the landlord may follow them and recapture them, but he must not break open the doors of a private house, or stable, or inclosure, nor enter the grounds of a third party for the purpose of retaking the goods, except it be on fresh pursuit (*x*).

Penalties are imposed (5 & 6 Wm. 4, c. 59, ss. 4-6) on parties neglecting to feed impounded cattle.

If the landlord refrains, at the request of the tenant, from removing the goods from the different rooms in which the landlord or his bailiff finds them, but takes an inventory of the goods, puts a man in possession, and hands to the tenant a notice of distress referring to the inventory, this is to all intents and purposes a distraining and impounding of the

(*p*) *Castleman v. Hicks*, Car. & Marsh. 266.

(*q*) *Thomas v. Harries*, 1 Sc. N. R. 534.

(*r*) *Dod v. Monger*, 6 Mod. 216.

(*s*) *Duncomb v. Reeve*, Cro. Eliz. 783.

(*t*) *Rea v. Bradshaw*, 7 C. & P. 283.

(*u*) 2 Wm. & M. sess. 1, c. 5, s. 4; 11 Geo. 2, c. 19, s. 10; Co. Litt. 47 b. *Costworth v. Betison*, 1 Raym. 104.

(*x*) *Rich v. Woolley*, 5 M. & P. 675; 7 Bing. 651.

goods. Each room is for the convenience of the tenant, and with his assent, converted into a pound for the goods therein (y).

Sale by landlords of things distrained for rent.—The statute 2 Wm. & Mary, c. 5, s. 1, recites that the most ordinary and ready way for recovery of arrears of rent is by distress, yet such distresses not being to be sold, but only detained as pledges for enforcing the payment of such rent, the persons distraining have little benefit thereby, for remedying whereof it is enacted (s. 2), that where any goods and chattels shall be distrained for any rent reserved or due upon any demise, lease, or contract whatsoever, and the tenant or owner of the goods shall not, within five days next after such distress taken, with notice thereof and the cause of such taking left at the chief mansion-house, or other most notorious place on the premises: charged with the rent, replevy the same with sufficient security, &c. (post, s. 2); that then, after such distress and notice, and after the expiration of the said five days, the person distraining "shall and may," with the sheriff or under-sheriff of the county, or with the constable, &c., cause the goods and chattels to be appraised by two sworn appraisers, and after such appraisement "shall and may lawfully sell the goods so distrained for the best price that can be gotten towards satisfaction of the rent and charges."

Of unlawful sale of things distrained after tender of the rent.—If after the impounding, and before the sale, a tender of the rent and expenses is made, the landlord cannot lawfully proceed to sell the things distrained; for it has been held that upon the equity of the statute of Wm. and Mary, which gives the tenant five days to replevy the things distrained (ante, p. 367), the tenant ought to have the same time for tendering the rent and expenses, and that an action is maintainable against a landlord who persists in selling after tender of the rent and costs at any time within the five days (z). In the case of a distress of growing crops the tenant may, at any time before the corn is ripe and fit to be cut, tender the rent due, and if after that the landlord takes the corn, he may be proceeded against as a trespasser (a).

Sale of growing crops and things distrained after a fraudulent removal.—*Tender of rent before sale.*—The statute 11 Geo. 2, c. 19, which enables landlords to distrain things fraudulently removed from the demised premises, also cattle or stock of their tenants depasturing on commons appurtenant, or in anyways belonging to the demised premises and growing crops (ante, p. 358), enacts, that "it shall and may be lawful"

(y) *Tennant v. Field*, 8 Ell. & Bl. 336; 27 Law, J., Q. B. 33.

(z) *Johnson v. Upham*, 28 Law, J., Q. B. 252, overruling *Ladd v. Thomas*, 12

Ad. & E. 117. *Ellis v. Taylor*, 8 M. & W. 415; and *Thomas v. Harries*, 1 M. & Gr. 695.

(a) *Owen v. Leigh*, 3 B. & Ald. 473.

for the landlord in convenient time to appraise, sell, or otherwise dispose of the same towards satisfaction of the rent and charges, in the same manner as other goods and chattels may be appraised and disposed of, the appraisement to be taken when the crops are cut, gathered, cured, and made, and not before; but it is enacted (s. 8), that if after any distress for arrears of rent so taken, and at any time before the crops shall be ripe and cut, cured, or gathered, the tenant or lessee, his executors, &c. shall pay to the landlord, or to the steward or other person usually employed to receive the rent, the whole rent then in arrear, with the costs and charges of the distress; that then, and upon such payment or lawful TENDER thereof actually made, whereby the end of such distress will be fully answered, the same shall cease, and the crops and produce distrained shall be delivered up to the tenant.

Of the parties to whom the tender of the rent may be made.—A bailiff authorised to distrain for rent has power given him at the same time to receive the rent, and the landlord has no right to circumscribe the bailiff's authority in this respect, for a tenant whose goods are seized under the extraordinary power vested in the landlord of distraining, ought to be enabled in all cases to release them at once by tender of the rent and costs to the bailiff. The power to receive the rent is therefore necessarily annexed to the warrant to distrain (b); but it does not follow, that because the tender may be made to the bailiff who distrains, it may be made also to any bailiff's follower who may be put into temporary possession of the goods (c).

Notice of distress is not essential at common law to the validity of the distress (d). It has been expressly laid down, that if the lord distrain for rent or services, he has no occasion to give notice to the tenant for what thing he distrains, for the tenant by intendment knows what things are in arrear for his lands as rent and services, &c. (e); but statute 2 Wm. & Mary, c. 5, s. 1, requires, as we have seen (ante, p. 367), notice of the distress to be given preparatory to a sale by the landlord, and the stat. 11 Geo. 2, c. 19, authorising the distress and sale of goods fraudulently removed (ante, p. 360), and of the cattle and stock of tenants depasturing on commons appurtenant or belonging to the demised premises, and growing crops (ante, p. 358), requires (s. 9) notice of the place where the goods and chattels distrained shall be lodged, to be given within one week to the tenant, or left at his last place of abode.

As the tenant is to have five days, under the stat. of Wm. & Mary, to

(b) *Hatch v. Hale*, 15 Q. B. 15; 19 Law, J., Q. B. 289.

(c) *Bolton v. Reynolds*, 8 Week. Rep. Q. B. 62.

(d) *Trent v. Hunt*, 9 Exch. 20.

(e) 1 Roll. Abr. 674, DISTRESS, pl. 1. *Tancred v. Leyland*, 16 Q. B. 680.

replevy from the time he receives notice of the distress, the notice should be given as soon as the distress has been levied. If the distress is not clearly intended to include all the goods and chattels upon the demised premises, the landlord must give the lessee distinct notice of the things included in such distress, in order that he may know what he is to replevy. And for this purpose, as soon as the distress is made, whether by the lessor or his bailiff, an inventory of the goods distrained should be made and served upon the lessee, together with the notice of the distress. The notice of the distress should set forth the amount of rent distrained for, and the particular things taken (*f*). A written notice of distress is not invalidated by a statement that the rent is due to A, whereas it is due to B, provided B has authorised the distress (*g*). If the landlord removes and sells goods and chattels which were not included in the inventory and notice, and which have not consequently been comprised in the distress, he is liable to an action for damages at the suit of the tenant (*h*).

Appraisement and sale.—If the tenant, after he has received notice of the distress, neglects for five days, to be computed inclusive of the last day and exclusive of the day of seizure, to pay the rent, the lessor or distrainer may cause the goods to be appraised in the mode appointed by the statute (*ante*, p. 367), and may afterwards sell them for the best price that can be got for them, and apply the purchase-money in discharge of the rent and the costs of the sale (*i*), leaving the surplus, if any, in the hands of the sheriff, under-sheriff, or constable, for the owner's use. The schedule of the statute 57 Geo. 3, c. 93, regulating the costs of appraisements, "whether made by one broker or more," refers only to the case of the employment of a single appraiser by consent, and does not dispense with the attendance of the two sworn appraisers (*k*). If the broker or person actually making the distress on behalf of the landlord constitutes himself one of the appraisers, the appraisement is wrongful and irregular (*l*). If the tenant holds under a covenant not to carry hay or straw off the demised premises, the landlord who has distrained hay and straw must sell it in the ordinary way for the best price. If he sells it, subject to a condition that the purchaser shall consume it on the land, he is liable to an action by the tenant for not selling at the best price (*m*).

Costs and expenses of the distress.—By 57 Geo. 3, c. 93, it is enacted, that no persons making any distress for rent under 20*l.* shall take or receive out of the produce of the things distrained and sold any more than

(*f*) *Wakeman v. Lindsey*, 14 Q. B. 625; 19 Law, J., Q. B. 166. *Kerby v. Harding*, 6 Exch. 234; 20 Law, J., Exch. 163.

(*g*) *Trent v. Hunt*, 9 Exch. 14.

(*h*) *Bishop v. Bryant*, 6 C. & P. 484.

(*i*) *Robinson v. Waddington*, 13 Q. B.

753.

(*k*) *Allen v. Flicker*, 10 Ad. & E. 640.

(*l*) *Westwood v. Cowne*, 1 Stark. 172.

(*m*) *Ridgway v. Ld. Stafford*, 6 Exch. 404; 20 Law, J., Exch. 226.

the following costs and charges : *i. e.* for levying the distress, 8s. ; for the man in possession, 2s. 6d. per day; for the appraisement, 6d. in the pound, with the amount of the stamp; for advertisements, 10s. ; for catalogues, sale, and commission, and delivery of goods to the purchaser, 1s. in the pound on the net produce of the sale. If more costs and charges are levied than those allowed by the act, the party aggrieved has a summary remedy before two justices for treble the amount of the charges, or he may bring an action for the recovery of them; but it is provided (s. 4) that no judgment shall be given against the landlord for such treble costs unless he has personally levied the distress. Every broker or other person who shall make and levy any distress is to give a copy of his charges, and of all the costs and charges of the distress signed by him, to the person on whose goods and chattels any distress shall have been levied, although the rent demanded may exceed the sum of 20l. (n). When the rent distrained for exceeds 20l., the costs are not limited to any particular amount or fixed scale of charge, but they must be fair and reasonable (o).

Effect of non-compliance with the requirements of the statutes authorizing the sale of things distrained.—The statute 11 Geo. 2, c. 19, s. 19, recites that it hath sometimes happened that upon a distress made for rent justly due, the directions of the statute 2 W. & M. c. 5, for enabling the sale of goods distrained for rent, have not been strictly pursued, but through the mistake or inadvertency of the landlord or other person entitled to such rent, and distraining for the same, or of the bailiff or agent of such landlord or other person, some irregularity or tortious act hath been afterwards done in the disposition of the distress so seized or taken, for which the party distraining hath been deemed a trespasser *ab initio*, and in an action brought against him, the plaintiff hath recovered the full value of the rent for which the distress was taken; it is enacted, that where any distress shall be made for rent justly due, and any irregularity or unlawful act shall be afterwards done by the party distraining, or his agents, the distress itself shall not be deemed to be unlawful, nor the parties making it be therefore deemed trespassers *ab initio*; but the party aggrieved by such unlawful act or irregularity may recover full satisfaction for the special damage he shall have sustained thereby, and no more.

The plaintiff, therefore, can only recover for an irregularity in distraining and selling where actual damage is proved. For the original taking there is to be no action; the distrainer is to be considered as being in possession of the goods, notwithstanding a subsequent irre-

(n) 1 & 2 Ph. & M., c. 12, s. 2. *Child v. Chamberlain*, 5 B. & Ad. 1049.

(o) *Lyon v. Tomkies*, 1 M. & W. 603.

gularity. And although he holds the goods with a special authority to deal with them in a particular way, and is liable for abusing that authority, yet the act says that the tenant shall recover full satisfaction for the damage, and no more. Where, therefore, there is no special damage there can be no satisfaction, and a verdict for nominal damages is not sustainable. Wherever the damages are merely nominal the defendant is entitled to a verdict (*p*). Where, therefore, the plaintiff in his declaration complained of the sale of his goods within five days, and proved that they were sold too soon, but there was no evidence to show that he had sustained any damage thereby, it was held that the judge ought to direct a verdict for the defendant (*q*).

Of the keeping of the distress as a security for the rent without exercising the statutory power of sale.—It has generally been considered that the words in the statute 2 Wm. & Mary, c. 5, "shall and may lawfully sell," mean that the landlord must give the statutory notice of the distress, and must proceed to appraise and sell, if the tenant does not replevy within the five days, or desire the landlord not to sell. If, however, the landlord should neglect to give notice of the distress, and to appraise and sell, but should content himself with keeping the goods in his hands, he will not be liable to an action for the detention or conversion of the chattels, unless the tenant can prove that he had gained a right to have the goods delivered up to him, and that he had sustained some special damage by the detention (*r*). The landlord has a lien for his rent upon the things distrained, and has at common law a right to keep them as a pledge until his rent is paid (ante, p. 345), and he could only be made responsible for not selling in an action founded upon the statute. The landlord may, with the assent of the tenant, detain the things distrained, or convert them to his own use in satisfaction and discharge of the rent (*s*).

Liability of the distrainer to his own bailiff for directing him to make a wrongful distress—Indemnification of agents.—We have already seen that if a landlord employs a bailiff to make a distress on a tenant for rent alleged to be due from such tenant to the landlord, and it turns out that the landlord had no right to distrain, and the bailiff has to pay damages for the unlawful distress in an action brought against him by such tenant, the bailiff may maintain an action against the landlord for compensation (*t*).

(*p*) *Rodgers v. Parker*, 18 C. B. 112; 25 Law, J., C. P. 220.

(*q*) *Lucas v. Tarleton*, 3 H. & N. 116; 27 Law, J., Exch. 248.

(*r*) *West v. Nibbs*, 4 C. B. 180. *Glynn*

v. Thomas, 11 Exch. 870. *Rodgers v. Parker*, 18 C. B. 112.

(*s*) *Jones v. Sawkins*, 5 C. B. 142.

(*t*) *Rawlings v. Bell*, 1 C. B. 959.

SECTION II.

OF DISTRESS DAMAGE FEASANT.

Seizure and impounding of animals and chattels damage feasant—Who may distrain things damage feasant.—Every occupier of land has a right to seize animals and chattels trespassing upon and doing damage to his land, and detain them until he is tendered or paid a fair compensation for the injury. The distress must be taken at the time the damage is done, for if the damage was done yesterday, and the distress taken to-day, that would be illegal (*u*). “If, therefore, a man coming to distrain beasts damage feasant sees the beasts on his ground, and the owner of the beasts, or his servants, chases them out before the distress be taken, though it be of purpose to prevent the distress, yet the owner of the soil cannot distrain them; and if he doth, the owner of the cattle may rescue them, for the beasts must be damage feasant at the time of the distress. A man may, therefore, distrain cattle damage feasant in the night, for otherwise, perhaps, the cattle will be gone before he can take them.”

“If a man takes my cattle and puts them into the land of another man, the tenant of the land may take these cattle damage feasant, though I, who was the owner, was not privy to the cattle's being damage feasant; and he may keep them against me until he has obtained satisfaction of the damages.”

A commoner may justify the taking of the cattle of a stranger upon the land damage feasant. And if a man hath a right of common for ten cattle, and he puts in more, the surplusage above the ten may be distrained damage feasant. If many cattle are doing damage, a man cannot take one of them as a distress for the whole damage, but he may distrain one of them for its own damage, and bring an action of trespass for the damage done by the rest (*x*). If cattle get out of the close before the party coming to distrain has got into it, they cannot be followed and distrained off the land (*y*).

The lord may distrain in respect of injuries done to his soil, and to his hedges, fences, and trees, although he has no interest in the herbage (*z*).

Of the right to distrain animals trespassing and doing damage on unfenced

(*u*) *Wormer v. Biggs*, 2 C. & K. 81.
Lindon v. Hooper, Cowp. 416.

(*x*) *Gilbert on Distress*, 4th edit. p. 22;
Co. Litt. 161 a. *Bac. Abr. DISTRESS*, F.

(*y*) *Clement v. Milner*, 3 Esp. 95. *Wormer v. Biggs*, 2 Car. & Kirw. 33.

(*z*) *Hoskins v. Robins*, 2 Wins. Saund.
 327 a.

lands adjoining public highways.—If the owner of lands adjoining a highway is bound by statute or prescription (ante, pp. 46, 47) to fence against the highway, and he neglects to do so, and cattle, whilst passing along the highway under the care of the owner or his servants, stray therefrom into the adjoining land, and do damage there, the owner of such adjoining land, who has brought the mischief on himself by neglecting to fence, has no right to distrain the cattle, unless they are abandoned and left there by the owner or his servants an unreasonable time. And if a man who has land adjoining a highway plants tempting green crops close adjoining the highway, and neglects to fence them off therefrom, so that cattle being driven along the publick thoroughfare are irresistibly invited to trespass on the adjoining land through the operation of the tempting food upon their natural instincts (ante, p. 80), the owner of such adjoining land who has so neglected to fence has no right to distrain the trespassing animals, unless the drovers who have charge of them fail in their duty in endeavouring to prevent them from trespassing and from continuing on the adjoining land (a). If the owner of the cattle has intrusted them to be driven by incompetent boys, or has neglected to send a sufficient number of drovers, and is therefore in default himself, he will be responsible for the damage done by his trespassing cattle, although the owner of the land was bound to fence against the highway, and had neglected to do so (ante, pp. 142, 250).

Whilst cattle are lawfully passing along a highway the owners of the cattle are, as we have seen, using the highway according to the dedication of the owner of the soil, and being there with his consent, they are occupying the highway; but if the cattle have strayed into the high road, and have passed therefrom into the adjoining close, they may be distrained there damage feasant, notwithstanding the owner of that close was bound to repair the fence between his close and the road, because the cattle were wrongfully on the road, and the owners were not occupying it so as to cast any obligation to repair the fence upon the distrainer, who is not bound to fence against trespassers (b).

What things may be distrained damage feasant.—The right of the owner or occupier of land to seize and detain animals and chattels trespassing upon and doing damage to his land (c) is restricted to such animals and chattels as are not in the actual possession and use, and under the personal care, of some human being. If a man rides upon my corn I cannot take his horse damage feasant, for that would lead to a breach of

(a) *Goodwyn v. Cheveley*, 4 H. & N. 631; 28 Law, J., Exch. 208; 33 Law, T. R. 284.

(b) *Manch. Sheff. & Linc. Rail. Co. v.*

Wallis, 14 C. B. 213; 23 Law, J., C. P. 85; ante, pp. 141, 142.

(c) Gilbert on Distress, 4th edit. p. 21, ante, p. 355.

the peace (*d*); neither can I take a horse and cart away from a man who is actually driving it, nor a horse or a dog which a man is leading by a string, nor any animal which is under the immediate control of the owner (*e*). It is not enough, however, to exempt a dog from seizure damage feasant, to allege that the dog was in the possession and under the personal care of the plaintiff, for that may be so and yet the dog may be running about trespassing, and may not be under his immediate control.

Where to a plea justifying the seizure of a dog damage feasant the plaintiff replied that the dog when taken was in the actual possession of the servant of the plaintiff, and was then under his personal care, and was being used by him, it was held that these allegations as applied to a dog were insufficient to establish such a possession and user as would exempt the dog from seizure. "The allegations," observes Patteson, J., "would be satisfied by proof that the dog was within sound of the servant's whistle, though the servant was out of sight" (*f*).

Shocks of corn may be taken damage feasant. If turves lie upon a common, damage feasant, a commoner may distrain them, but he cannot burn them. A greyhound may be distrained running after conies in a warren, and so may a ferret brought into a warren. If a man brings gins and nets through my warren I cannot take them out of his hand, but if men are rowing upon my water, and endeavouring with their nets to catch fish in my several piscary, I may take their oars and nets, and detain them as damage feasant, to stop their further fishing (*g*).

Distress by railway companies of locomotive engines damage feasant.—All railway companies have a common-law right to distrain engines and carriages encumbering their railway and obstructing the right of passage along the line; and the provisions of the Railway Clauses' Consolidation Act, with respect to the introduction of engines upon the railway and the removal of improperly constructed engines, do not control or qualify this right, but give a cumulative remedy (*h*).

Tender of sufficient amends rendering the distress wrongful.—If the lord or his bailiff comes to distrain beasts damage feasant, and before the distress the owner of the beasts tenders sufficient amends, and the distrainer refuses it, the latter becomes a wrongdoer if he then distrains. Tender before the distress makes the distress tortious. Tender after the distress makes the detainer and not the taking wrongful.

The hazard of the sufficiency of the tender rests upon the wrongdoer,

(*d*) 9 Vin. Abr. 121; DISTRESS, A, pl. 4.

(*e*) *Field v. Adames*, 12 Ad. & E. 649.

(*f*) *Bunch v. Kennington*, 1 Q. B. 680.

(*g*) Bac. Abr. DISTRESS, F.

(*h*) *Ambergate, &c. Rail. Co. v. Mid. Rail. Co.*, 2 Ell. & Bl. 799.

whose cattle have trespassed, and not upon the party who has suffered by the trespass. If the latter, therefore, demands an exorbitant sum for compensation, that will not dispense with the necessity of a tender of a proper compensation, and will not relieve the owner of the trespassing cattle from the obligation of estimating and tendering at his own risk the proper amount of damage (i), for he, being the original wrongdoer, by suffering his cattle to trespass, is bound to tender the sum which he maintains to be sufficient, before he is in a position to complain of the exorbitant amount of compensation claimed. If he has tendered a sufficient sum before distress made, his remedy would be by replevin or action for a trespass, and if after the distress, but before impounding, an action for the unlawful detention of the things taken (k).

The statute 2 W. & M. c. 5, which enables landlords to sell things distrained for rent, does not extend to distresses damage feasant. Consequently they remain as they were at common law, mere pledges, and the sale of them will make the party distraining a trespasser *ab initio*, unless the sale was necessary to cover the expense of finding food for the animals distrained, and can be justified under the stat. 5 & 6 Wm. 4, c. 59.

Sale of impounded cattle and animals to defray the cost of their food.—By the stat. 5 & 6 Wm. 4, c. 59, it is enacted, that every person who shall impound or confine cattle or animals in any common pound or inclosed place shall provide them with food, and be at liberty, after the expiration of seven clear days from the time of impounding the same, to sell any such animals openly in the publick market, after having given three days' publick printed notice thereof, and apply the produce of the sale in discharge of the value of such food and nourishment and the expenses of the sale, rendering the overplus to the owner of the animals. Where several beasts have been distrained and impounded damage feasant, the distrainer cannot justify the sale of each beast individually in discharge of the cost of its food and the expenses. Parties availing themselves of the statute must show that it was necessary to sell the number they did sell, or that they sold one, and that it did not produce enough, and then that they sold more. "The power is measured by the necessity of the case, and if the distrainer is obliged to keep the distress for an indefinite period, there is nothing to prevent him from selling from time to time to defray the expenses (l).

By the Roman law, he who took the cattle of another person feeding in his ground, or doing any other damage, was responsible for any violence

(i) *Gulliver v. Cosens*, 1 C. B. 795.

(l) *Layton v. Hurry*, 8 Q. B. 819; 15

(k) *Glynn v. Thomas*, 11 Exch. 870; Law, J., Q. B. 244.

25 Law, J., Exch. 128.

doing hurt to the cattle, or for driving them in any other manner than he would his own; and if he caused any damage to the cattle, he was bound to make it good (*m*).

Duties and responsibilities of pound-keepers.—It has been held, that if an officer charged with the performance of certain public duties does that which belongs to his office, and intermeddles no further, he shall not be liable for any precedent tortious act of which he could know nothing. A pound-keeper, therefore, who only does the duty of his office by impounding things brought to him, does not by detaining them in the pound render himself responsible for the unlawfulness of the distress. The pound-keeper is bound to take and keep whatever is brought to him, at the peril of the person who brings it, without any judgment, direction, examination, or warrant; and if the things have been wrongfully taken, the person bringing them to the pound, and not the pound-keeper, is responsible for the wrong. "It would be terrible," observes *Ld. Mansfield*, "if a pound-keeper were liable to an action for refusing to take cattle in, and were also liable to another action for not letting them go" (*n*).

SECTION III.

OF THE REMEDY BY REPLEVIN AND BY ACTION FOR UNLAWFUL AND EXCESSIVE DISTRESSES AND SALE OF THINGS DISTRAINED.

Replevin of things distrained.—By the common law, whenever the goods of one man had been wrongfully distrained by another (not being a sheriff or his officer acting in execution of the process of a superior court), and the party out of whose possession the goods had been taken wished to have them restored to him, and to try the lawfulness of the seizure, he might get back his goods by giving security to the sheriff of the county to prosecute an action with success, and make out the injustice of the taking. The proceeding by which this was accomplished was called a replevin, or the getting back of a chattel taken and detained as a pledge or security, by substituting another pledge in the place of the thing taken (*o*).

The authorities all lay it down that replevin can only be maintained

(*m*) Domat, liv. 2, tit. 8, s. 2, § 6.

(*n*) *Badkin v. Powell*, Cowp. 478.

(*o*) Co. Litt. 145 b.; Spelman, Gloss, 485; Gilbert on Replevins.

where goods are taken by one man out of the possession of another; not where they have been delivered upon a contract; and this is clear upon the form of pleading, which always is, that the defendant "took and detained" the goods, the plea to which allegation is *non cepit* (p). Replevin does not lie for goods which were taken abroad, but are detained here (q), as the object of the proceeding is to restore the possession as it was before the taking.

The writ of replevin, observes Lord Redesdale, "is merely meant to apply to the case where A takes goods wrongfully from B, and B applies to have them redelivered to him upon giving security, until it shall appear whether A has taken them rightfully. But if A be in possession of goods and B claims a property, this is not the writ to try that right" (r). Where therefore a bailee, who had the lawful possession of chattels by delivery from the owner, placed the chattels in the hands of the defendant, who set up a lien upon them, and the plaintiff proceeded to replevy the goods and bring an action of replevin, it was held that he had mistaken his remedy and could not proceed by replevin, but should have proved his prior right in an action for detaining, or for wrongfully converting the chattels. "The whole proceeding of replevin at common law," observes Coleridge, J., "is distinguished from that in trespass, in this, amongst other things, that while the latter is intended to procure a compensation in damages for goods wrongfully taken out of the actual or constructive possession of the plaintiff, the object of the former is to procure a restitution of the goods themselves, and this it effects by a preliminary ex-parte interference by the officers of the law with the possession. This being done, the action of replevin, apart from the replevin itself, is again distinguished from the action of trespass by this, that at the time of declaring the supposed wrongful possession has been put an end to, and the litigation proceeds for the purpose of deciding whether he, who by the supposition was originally possessed, and out of whose possession the goods were originally taken, and to whom they have been restored, ought to retain that possession, or whether it ought to be restored to the defendant."

As a general rule, it is thought just that a party in the peaceable possession of goods should remain undisturbed, either by the parties claiming adversely or by the officers of the law, until the right be determined and the possession shown to be unlawful. But where, either by distress or merely by a strong hand, the peaceable possession has been disturbed, an exceptional case arises; and it is thought just that even

(p) *Galloway v. Bird*, 4 Bing. 301.

(q) *Nightingale v. Adams*, 1 Shower, 91.

(r) *Wilsons in re*, 1 Sch. & Lef. 320 n.

before any determination of the right the law should interpose to replace the parties in the condition in which they were before the act done, security being taken that the right shall be tried, and the goods be forthcoming to abide the decision (s).

The proceedings in replevin were formerly originated by a writ sued out of the High Court of Chancery, by the party whose goods had been taken, and directed to the sheriff of the county, commanding him to replevy the goods and to do justice in the matter. But the statute of Marlbridge (52 Hen. 3, c. 21), authorised the sheriff to replevy on his own authority, and without any suit in replevin, on complaint being made to him of the wrongful taking, and the requisite sureties and pledges being tendered (t). The recent statute, 19 & 20 Vict. c. 108, for amending the acts relating to the county courts, enacts (s. 63) that the powers and responsibilities of the sheriff with respect to replevins shall thenceforth cease; and the registrar of the county court of the district in which any distress subject to replevin is taken is empowered to approve of replevin bonds, and to grant replevins on security being given (ss. 65, 66), and to issue all necessary process in relation thereto to be executed by the high bailiff.

Replevin in the county court.—If the replevisor wishes to proceed in the county court, he must give security, to be approved of by the registrar, for the rent or damage in respect of which the distress was made and the costs in the county court, and must bind himself with sureties to commence an action of replevin against the distrainer in the county court of the district within which the distress was taken within one month from the date of the security, and to prosecute such action with effect and without delay, and to make a return of the goods, if a return thereof shall be adjudged.

The action of replevin in the county court may be removed by certiorari into the superior court by the defendant, on security being given by him to the master conditioned to defend the action with effect, and to prove that the defendant had good ground for believing that title, &c. was in question, or that the rent or damage in respect of which the distress was taken exceeded 20*l.* An appeal from the decision of the county court is allowed where the amount of the rent or damage exceeds 20*l.*, and in all actions where the parties have agreed to the jurisdiction.

Replevin cannot be joined with any other form of action in the county court (u).

Replevin in the superior courts.—The action of replevin may be commenced in any superior court, in the form applicable to personal

(s) *Mennie v. Blake*, 6 Ell. & Bl. 851; stat. 1.
25 Law, J., Q. B. 401.

(u) *Mungean v. Wheateley*, 6 Exch.

(t) See the stat. West. 2, 13 Ed. 1, 88.

actions therein, on proper security being given for the rent or damage in respect of which the distress has been made, and the probable costs of the cause in a superior court. The replevisor must also give security, binding himself with sureties to commence the action in the superior court against the distrainer within one week, to prosecute such action with effect and without delay, and unless judgment be obtained by default, to prove that he had good ground for believing either that title, &c. was in question, or that the rent or damage exceeded 20*l.*, and to make return of the goods if a return thereof should be adjudged.

Actions for unlawfully selling impounded animals and cattle.—By 5 & 6 Wm. 4, c. 59, s. 4, authorising parties who have impounded cattle to provide food for them, and sell them to obtain money to defray the cost of their food, it is enacted (s. 19), that all actions brought against any person for anything done in pursuance or under the authority of the act, shall be commenced within a month after the fact committed, and be tried in the county or place where the cause of action arose, and notice in writing of the action and of the cause thereof shall be given fourteen clear days before the commencement of the action; and the defendant in the action may plead the general issue, and give any matter or thing in evidence thereupon; and if the cause of action appears to arise in respect of anything done in pursuance of the act, or if the requirements of the act have not been complied with, or if tender of sufficient amends has been made before action, or if a sufficient sum of money has been paid into court after action by or on behalf of the defendant, the jury are to find a verdict for the defendant.

To enable a party to avail himself of the protecting clause of this Act of Parliament, it must be shown that the cattle or animals had been impounded by the defendant in the intended exercise of a right to distrain, and that he either had the right or at least some colour for thinking that he had (*x*).

Of actions for unlawful and excessive distresses.—If a landlord has distrained for rent, no rent being in arrear or due, the proper remedy is by action upon the statute for double the value of the things distrained (ante, p. 363). If the landlord has distrained for more rent than is due, and the tenant has tendered the amount due before the distress made, his remedy, if a distress is afterwards made, would be either by replevin, or an action for a trespass, or for the wrongful seizure and conversion of the things distrained. If the tender is made after the distress, an action would be maintainable for the detention of the property (*y*). The mere

(*x*) *Machell v. Ellis*, 1 C. & K. 685.

(*y*) *Fulliver v. Cosens*, 1 C. B. 788.

Glynn v. Thomas, 11 Exch. 878; ante, p. 367.

retaining by the landlord of the goods distrained after the tenant has gained a right to have them delivered up to him will not render the landlord liable to an action for a trespass. A landlord, therefore, who refuses a proper tender, is not to be regarded as a trespasser merely by reason of his non-feazance in failing to deliver up the distress, he being required so to do, but his refusal may amount to evidence of a conversion (z).

If a landlord makes a second distress for the same rent when he might have taken sufficient at first, he is liable to an action for the wrongful conversion of the things seized under the second distress (a).

Parties to be made plaintiffs.—A person from whose possession goods and chattels have been taken is entitled to replevy them, and try the lawfulness of the taking. Thus, he who hath the goods of another pledged to him, or who hath the cattle of another to manure his land, has a sufficient property to maintain replevin (b). If the cattle of a *feme sole* be taken, and afterwards she marry, the husband alone must bring the action, for the cattle rest exclusively in the husband by the marriage; but if the goods taken are those which the feme has as an executrix, she may join with her husband in the replevin (c).

An action for an excessive distress may be brought by a lodger or under-tenant whose goods have been taken, as well as by the lessee himself (d).

Parties to be made defendants—Liability of distrainers for the unlawful acts of their bailiffs—Master and servant.—We have seen that a master is liable where his servant causes injury by doing a lawful act for his master negligently (ante, pp. 256, 257), but not where he wilfully does an illegal act, not authorised by his master. Therefore, if a servant, authorised merely to distrain cattle damage feasant, drives cattle from the highway into his master's close, and there distrains them, the master will not be responsible for the wrongful act (e). Where a landlord authorised his bailiff to distrain for rent due to him from his farm-tenant, and the bailiff by mistake distrained the cattle of another person beyond the boundary of the farm, and sold them, and paid over the money he received for them to the landlord, it was held that the landlord was not responsible for the trespass, unless he received the money knowing of the wrongful seizure,

(z) *West v. Nibbs*, 4 C. B. 172.

(a) *Dawson v. Cropp*, 1 C. B. 961.

(b) Co. Litt. 145; Winch, 26; Bac. Abr. REPLEVIN, F. G.

(c) Sid. 172; Bro. Bar. & Feme, pl. 85; 2 Lev. 107. *Serres v. Dod*, 2 N. R. 405.

(d) *Fisher v. Algar*, 2 C. & P. 374.

Bail v. Mellor, 19 Law, J., Exch. 279. And see further as to parties to actions for the unlawful seizure and conversion, and unlawful detention of chattels, ante, pp. 220–224, 255, 290–292.

(e) *Lyons v. Martin*, 8 Ad. & E. 512; ante, p. 159.

or unless he meant to adopt the act of the bailiff at all hazards (*f*). But if the landlord has appointed an inexperienced, insolvent, or incompetent bailiff, or has neglected to furnish him with proper instructions, he will be responsible in damages in an action for negligence (*ante*, p. 241). And every landlord who gives a broker a general authority to distrain is responsible if the broker exceeds his authority, by distraining things which are not distrainable (*g*), or sells goods without having them duly appraised (*h*); but a landlord who does not personally interfere in making a distress is not liable for the neglect of the broker in not delivering a copy of the charges, &c., pursuant to the statute (*i*).

All persons who aid, or counsel, or direct, or join in a trespass, are joint-trespassers, but one partner cannot drag another into a trespass without his previous consent, or without his subsequent concurrence. Where, therefore, one of several partners signed a distress-warrant in his own name on behalf of the firm, it was held that this was no proof that the distress was authorised by the firm, so as to render the other partners responsible for it. It must be shown, either by evidence before the transaction that they all joined in ordering the distress, or by evidence afterwards that they concurred in and received the benefit of it (*k*).

Declarations in replevin simply set forth that in a certain dwelling-house, or in a certain close or common, in a certain named parish and county, the defendant took certain cattle or goods and chattels of the plaintiff (describing them), and that the plaintiff unjustly detains them against sureties and pledge until, &c. claiming damages.

Declarations for a wrongful seizure of goods not distrainable.—If beasts of the plough or the tools of a man's trade have been wrongfully distrained, there being other goods of sufficient value on the demised premises to satisfy the rent, the ordinary declaration for a trespass in seizing and taking away the plaintiff's chattels correctly describes the true cause of action (*l*).

Declarations for an excessive distress usually set forth the tenancy between the plaintiff and defendant, the amount of rent payable, the levy of the distress for certain arrears of rent, and the amount of such arrears, averring that one-half or one-third part, as the case may be, of the goods so distrained would have been of sufficient value to have satisfied the arrears of rent, and the costs and charges of the distress and of the appraisement and sale thereof, and that the defendant thereby took an

(*f*) *Lewis v. Read*, 13 M. & W. 837.
Freeman v. Roshier, 13 Q. B. 780.

(*g*) *Gannitt v. King*, 3 C. B., N. S. 50.

(*h*) *Haseler v. Le Moine*, 7th Week.
 Rep. C. P. 14.

(*i*) *Hart v. Leach*, 1 M. & W. 580.

(*k*) *Petrie v. Lamont*, Car. & M. 96;
ante, pp. 159, 223.

(*l*) *Nargall v. Nias*, 28 Law, J., Q. B.
 146; 5 Jur. Q. B., N. S. 198.

excessive and unreasonable distress for the said arrears of rent, contrary to the form of the statute in that behalf made; claiming a certain specified sum as damages.

Selling under value is a distinct ground of complaint, and ought to be distinctly stated on the face of the declaration if the plaintiff means to rely upon it (*m*). A plaintiff cannot, therefore, under the common count for an excessive distress, show that the defendant had distrained for and sold goods exceeding the rent due, and a count for such a cause of action will not be allowed to be added at the trial, where it does not appear to have been a matter in dispute between the parties at the commencement of the action (*n*).

Declarations for a second distress for the same rent (ante, p. 365) should show that the defendant took and distrained the goods of the plaintiff for rent then alleged to be due to him in respect of certain premises, in the occupation of the plaintiff, that the goods then on the premises were more than sufficient in value to have satisfied the whole of the rent then due, and the costs and charges attending the distress and sale of the goods distrained, but that the defendant, nevertheless, wrongfully made a second distress on the goods and chattels of the plaintiff on the said premises for the same rent, which ought to have been satisfied under the first distress, and wrongfully converted and disposed of the said last-mentioned chattels to his own use, whereby the plaintiff was injured in his credit and circumstances, &c. (*o*).

Declarations for distraining and selling goods where no rent was due, and to recover double value, after setting forth the tenancy between the plaintiff and the defendant, the rent payable by the plaintiff to the defendant, the wrongful seizure upon the demised premises of certain specified goods and chattels of the plaintiff, of a certain specified value, by way of a distress for certain named arrears of rent then pretended by the defendant to be due from the plaintiff to the defendant by virtue of the said demise, proceeds to aver a wrongful sale of the said goods and chattels, showing that at the time of the making of the said distress and sale no rent was due to the defendant in respect of the demised premises. The plaintiff should then claim a certain specified sum, as double the value of the goods distrained, according to the statute in that behalf made and provided.

Declarations for distraining and selling goods without notice of distress, or without appraisement, or for not selling for the best price.—A good cause of action may be shown by a declaration which alleges that the defendant

(*m*) *Thompson v. Wood*, 4 Q. B. 498.

(*n*) *Lucas v. Tarlton*, 3 H. & N. 116;

27 Law, J., Exch. 246.

(*o*) *Smith v. Goodwin*, 4 B. & Ad. 413.

wrongfully seized divers goods and chattels of the plaintiff (enumerating them), of a certain specified value, then being upon certain premises of the defendant, as and for a distress for rent claimed by the defendant to be in arrear and due from the plaintiff to the defendant for the said premises, and afterwards wrongfully sold the said goods and chattels, without having given to the plaintiff a notice of the said distress and of the cause of taking the same, or left such notice at the chief mansion-house, or other most notorious place on the said premises;—or wrongfully sold the said goods and chattels, without causing them to be duly appraised by two sworn appraisers (*p*);—or wrongfully sold the said goods and chattels for much less than the best price that could be gotten for them, had they been sold with reasonable care and diligence.

Pleas in replevin—Non cepit.—Pleas in replevin are generally either pleas in bar, or in justification, or by way of cognizance, or by way of avowry. The defendant may either avow or justify, at his election. The general issue in replevin is non cepit, and this may be pleaded by one of several defendants. It is a simple traverse of the allegation in the declaration in replevin of the taking of the chattels, and merely alleges that the defendant did not take the cattle or the goods and chattels in the declaration mentioned. This is the proper plea when the defendant denies that he was the party distraining, or that he distrained in the place described in the declaration. If the defendant wishes to dispute the plaintiff's property in the goods, he must plead a plea specially alleging that the goods and chattels in the declaration mentioned were, at the said time when, &c., the property of the defendant, or of some named third party, and not the property of the plaintiff (*q*).

Under a plea of non cepit in an action of replevin the defendant may, under the Municipal Corporations Act, show that he was a constable appointed for a borough, and took the goods within the county wherein the borough is situate, but without the borough, on a charge that they had been stolen (*r*).

Avowries in replevin.—By 11 Geo. 2, c. 19, s. 22,¹ it is enacted, that all defendants in replevin may avow or make cognizance generally that the plaintiff or other tenant of the lands and tenements whereon a distress was made enjoyed the same under a grant or demise at such a certain rent during the time wherein the rent distrained for incurred, which rent was then due, and still remains due, without further setting forth the grant, tenure, demise, or title of such landlord or landlords, lessor or lessors, owner or owners of such manor.

(*p*) *Bishop v. Bryant*, 6 C. & P. 484.

(*q*) Com. Dig. PLEADER, 3 K. 11.

Dover v. Rawlings, 2 Mood. & Rob. 544.

(*r*) *Mellor v. Leather*, 1 Ell. & Bl. 619;

5 & 6 Wm. 4, c. 76, s. 76; post, ch. 11,

s. 1.

The common avowry or cognizance should show that the tenancy continued up to the time of the making of the distress (*s*). If the tenancy was determined at the time of the distress, but the tenant still continued in possession, and the distress was founded on 8 Anne, c. 14 (*ante*, p. 349), the avowry should be based on that statute. After setting forth the tenancy, the amount of rent in arrear, the time when it became due, &c. (*t*), the avowry or cognizance avows generally that the defendant took the cattle, goods, and chattels in the close in the declaration mentioned, as and for a distress for the rent due and in arrear, or that he took them as bailiff of the landlord. The landlord who authorized the distress and the bailiff who seized by his directions may both join in making the common avowry and cognizance.

The general form of avowry, authorized by 11 Geo. 2, c. 19, s. 22, applies to rents only; but penalties for breaches of covenants respecting the cultivation of the demised premises granted by deed to be levied by distress may be treated as a rent (*u*).

A cognizance by a defendant, as bailiff of an executor, for rent due to the testator is supported by proof of a distress by him in the name of the testator, and by his direction, but after his death, such distress, though made before probate, having been afterwards adopted and ratified by the executor (*x*).

Avowries for double rent, under the statute 11 Geo. 2, c. 19, s. 18 (*ante*, p. 383), should show the nature of the tenancy: that the tenant had power to determine it by giving notice to quit; that he did give notice to quit at a time mentioned in such notice, that the tenancy became thereby determined; that the defendant did not deliver up possession at the time mentioned in such notice, and then became liable to pay double the rent which he would otherwise have paid; that a certain specified sum, being half a year, or three quarters of a year, of such double rent, became due, and that the plaintiff took the goods in the declaration mentioned as and for a distress for such rent (*y*).

Avowries by joint-tenants, coparceners, and tenants-in-common.—We have seen that any one of several coparceners and co-heirs in gavelkind who has levied a distress may avow and justify the distress in his own right, and make conuzance as the bailiff of the others, without averring or proving any express authority from them to distrain (*ante*, p. 351). If the distress is made by a bailiff or agent on behalf of all, all must join in the avowry and conuzance (*z*). Tenants-in-common, on the other hand,

(*s*) *Williams v. Stiven*, 9 Q. B. 14.

(*t*) *Roskrige v. Caddy*, 7 Exch. 840.

(*u*) *Pollitt v. Forrest*, 11 Q. B. 967.

(*x*) *Whitehead v. Taylor*, 10 Ad. & E.

210.

(*y*) *Humberstone v. Dubois*, 10 M. & W.

765.

(*z*) *Stedman v. Bates*, 1 Salk. 389.

must avow the taking of the distress in respect of their several shares. Thus, if three tenants-in-common distrain thirty beasts, one of them must avow for ten, the other for ten, and the third for ten more (a). But one of several tenants-in-common may, as we have seen, distrain and avow for his own share of the rent (ante, p. 351).

Pleas in bar to an avowry—Non tenuit—Riens in arriere.—The plaintiff may, by a plea in bar, deny generally all the allegations contained in the avowry (b), unless he is compelled by a judge's order, under the provisions of the Common Law Procedure Act, to traverse separately the tenancy, the fact of the rent being in arrear, or the authority to distrain. The plea of non tenuit is a traverse of the demise stated in the avowry. It alleges that the plaintiff did not hold the said messuage or tenement, land and premises, under the alleged demise thereof in the avowry mentioned. Under this plea it may be shown that the tenure alleged in the avowry was extinguished and put an end to before the time of the distress, either by twenty years' adverse possession under the statute of limitations (c), or by a transfer of the landlord's reversionary estate to an assignee or mortgagee who has demanded the rent (d).

The plea of riens in arriere simply alleges that no part of the rent alleged in the avowry to be in arrear was in arrear. Under this plea payments made to a ground landlord, or other incumbrancer having claims paramount to the claim of the immediate landlord making the distress, may be given in evidence in reduction of the rent, as such payments are always presumed to be authorised by the landlord, he being obliged to protect the tenant from them, and are treated as payments of rent by the tenant (e). But payments which are not a direct charge upon the demised premises cannot be given in evidence in satisfaction and discharge of the rent, unless they were directed or sanctioned by the landlord (f). The meaning of the plea of riens in arriere is, that the plaintiff at the time of the distress was in arrear to nobody; and if he has not paid anybody, he cannot, under this plea, contest the defendant's right to the rent (g).

Payment of money into court.—If goods have been taken in closes A and B, and the defendant can justify as to part of the taking in A, but not as to the taking in B, as, for instance, if B was not part of the demised premises, the defendant may give up the case wholly as to B, by paying money into court in respect of the goods there taken, and partially

(a) Litt. sec. 314–317. *Philpott v. Dobbinson*, 3 M. & P. 320.

(b) *Trent v. Hunt*, 9 Exch. 20.

(c) *De Beauvoir v. Owen*, 5 Exch. 177.

(d) *Wheeler v. Branscombe*, 5 Q. B. 379.

(e) *Jones v. Morris*, 3 Exch. 746.

(f) *Davies v. Stacey*, 12 Ad. & E. 511.

(g) *Wightman, J., Wheeler v. Branscombe*, 5 Q. B. 379.

as to A, by paying in respect of those which he does not propose to justify the taking, and making avowry as to the residue (h).

Of the plea of Not guilty "by statute" in actions of trespass, or upon the case for an unlawful distress.—By the statute 11 Geo. 2, c. 19, s. 21, it is enacted, that in all actions of trespass, or upon the case against persons entitled to rents or services, their bailiffs or other persons, relating to any entry upon premises chargeable with such rents or services, or to any distress or seizure thereupon, it shall be lawful for the defendants to plead the general issue, and give the special matter in evidence, inserting in the margin of the plea the words "by statute" (i). Under the plea of Not guilty "by statute," therefore, the defendant may give in evidence that he entered the plaintiff's house under a warrant of distress for rent, and was forcibly turned out of possession, and that he thereupon re-entered, and broke open the door of the house, in order to seize the plaintiff's goods. Everything which he might lawfully do in order to make the distress is admissible in evidence under this plea (k). The plea puts in issue not only the matter of justification but the tenancy and ownership of the goods (l).

A plea of justification of trespass on the ground that the plaintiff had a right to distrain, must show that the plaintiff had such an estate and interest in the premises as would entitle him to distrain (m), or that he had some express authority or license to distrain. The common avowry of a distress for rent does not set out title, because the statute 11 Geo. 2, c. 19, s. 22, gives a statutory form, and therefore a lawful demise is implied, but that statute is confined to actions for replevin.

Pleas justifying an entry upon the plaintiff's land for the purpose of distraining goods fraudulently removed there by the defendant's tenant to avoid a distress, should set forth the fact of the tenancy, of rent being in arrear, and of the fraudulent removal of the goods by the tenant from the house demised to him by the defendant, in order to prevent the defendant from distraining the goods, and the deposit of the goods in the plaintiff's house with his privity and consent, and should then go on to justify the entering the house in order to seize the goods under the provisions and in the mode prescribed by the statute 11 Geo. 2, c. 19, s. 1 (n).

Pleas justifying the seizure of animals on the ground that they were taken

(h) *Lambert v. Hepworth*, 2 Q. B. 729; 3 & 4 Wm. 4, c. 42, s. 21. As to payment into court generally, see post, ch. 20.

(i) Reg. Gen. Hil. Term, 16 Vict. R. 21; 1 Ell. & Bl. App. lxxxiii.

(k) *Eagleton v. Gutteridge*, 11 M. & W. 469.

(l) *Williams v. Jones*, 11 Ad. & E. 648; and see post, ch. 20.

(m) *Pinlorn v. Souster*, 8 Exch. 138.

(n) See the forms in *Norman v. Wescombe*, 2 M. & W. 349. *Rich v. Woolley*, 7 Bing. 651. *Bowler v. Nicholson*, 12 Ad. & E. 341.

damage feasant, should set forth the defendant's possession of a close or of land whereon certain cattle of the plaintiff were trespassing and doing damage, and that the defendant thereupon took the cattle by way of a distress for the damage, and drove them to a common pound and there impounded them, and that this act of the defendant is the injury complained of by the plaintiff in his declaration (o). If the plaintiff's cattle strayed from a highroad into the defendant's close, through the defendant's neglect to repair fences, which he was bound by statute or prescription to repair, this must be replied specially by a replication, alleging that the cattle were lawfully using the highway; that it was the duty of the defendant to have fenced against the highway, and that he neglected so to do (p).

Plea of a recovery of the goods in an action of replevin.—A plea by the defendant, setting forth that the plaintiff commenced and prosecuted an action against the defendant in the county court of the district within which the distress was taken, and obtained the judgment of the court for the return of the goods, and has recovered his goods and damages for the taking and detaining them, is a good plea in bar to an action for an excessive distress, as it shows that the plaintiff has already had his remedy (q).

Evidence at the trial—Proof on the part of the plaintiff—Proof of the distress.—In order to establish the fact of a distress having been made by the defendant upon the goods and chattels of the plaintiff, it is not necessary to prove an actual seizure of the plaintiff's goods. If the landlord's agent goes upon the plaintiff's premises, and declares that he has come to distrain for rent, and that nothing shall be removed, this, as we have seen, is evidence of the making of a distress, though no single article is touched by such agent (ante, p. 361). Where a warehouse-keeper or lodging-house-keeper refused to let the goods and chattels of his tenant or lodger be removed until rent claimed by him to be due was paid, this was held to be evidence of the making of a distress (ante, p. 362). Where the defendant's broker appeared upon the plaintiff's premises, and said, "Unless you pay me 21l. for rent and three guineas for expenses, I shall take your goods," and the plaintiff paid the money, it was held that it did not lie in the defendant's mouth after receiving the money to say there was no distress (r).

Proof of no rent being due and of unlawful and excessive distresses.—If the plaintiff sues the defendant on the statute for distraining when no rent was due, he must prove that he held the land on which the distress

(o) *Bond v. Downton*, 2 Ad. & E. 26.(p) *Goodwyn v. Cheveley*, 4 H. & N. 631.(q) *Phillips v. Berryman*, 3 Doug. 288;

post, ch. 20.

(r) *Hutchins v. Scott*, 2 M. & W. 811.

was taken as tenant to the defendant, and must in general produce and prove the lease, if he holds under a written demise. If the lease is in the hands of the landlord, he should give the latter notice to produce it (*s*), he should then prove the amount of the rent, the period at which it became payable, and that it had been paid to and received by the landlord or his authorized agent, at the time of the levy of the distress. If the plaintiff complains of the wrongful seizure of goods not distrainable, he must prove the nature and character of the goods seized, and that they were privileged from distress (*ante*, pp. 353–356), and it is for the defendant to show any circumstances rendering the distress in the particular instance lawful, such as that there were no other distrainable goods on the demised premises sufficient to satisfy the rent (*ante*, p. 354). If the plaintiff complains of an excessive distress, he must prove the tenancy; the amount of rent payable to the defendant; the value of the goods distrained, and that some actual or special damage has been sustained from the defendant's having distrained and taken an unreasonable quantity of the plaintiff's goods. It is not, as we have seen, for every trifling excess that an action is maintainable for an excessive distress. It must be disproportionate to some considerable extent (*ante*, p. 363); and must be productive of actual loss or damage to the plaintiff (*t*).

If the ground of action is that the defendant distrained for more rent than was really due, the plaintiff must prove that he tendered to the defendant the sum really due, with enough to cover the lawful charges of the distress (*u*), or that the defendant sold the things distrained, and realized by the sale of them more than was sufficient to satisfy the rent really due with the costs of the distress (*x*).

Proof of material averments in the declaration.—The statement in a declaration for an unlawful distress of the name of the party to whom the rent distrained for is due, is material, and must be proved as laid (*y*). But it is not necessary to prove the precise amount of rent alleged in the declaration to be due (*z*).

Proof that the defendant ordered or authorized the distress.—In order to prove that the distress was made by the order or authority of the defendant, the warrant should, if the distress was authorized by warrant in writing, be produced and proved; or a notice to produce it should be given to let in secondary evidence of it; but it is not necessary, as we have seen, to prove the warrant in order to fix the defendant as the author of

(*s*) Post, ch. 20.

(*t*) *Lucas v. Tarleton*, 3 H. & N. 120; 27 Law, J., Exch. 246. *Piggott v. Birtles*, 1 M. & W. 450.

(*u*) *Glyn v. Thomas*, 11 Exch. 878; 25 Law, J., Exch. 125.

(*x*) *Tancred v. Leyland*, 16 Q. B. 680.

French v. Phillips, 1 H. & N. 567.

(*y*) *Ireland v. Johnson*, 1 Bing. N. C. 106.

(*z*) *Gwinnett v. Phillips*, 3 T. R. 648. *Sells v. Hoare*, 8 Moore, 454.

the unlawful proceeding. His conduct, and acts, and admissions in the matter are evidence against him, although he has clothed his agent with an authority in writing. If he has received the money realized by the distress (ante, p. 380), or has personally interfered with the impounding or sale of the goods, or has ratified and adopted the act of the broker levying the distress, these circumstances are admissible in evidence against him, to show that he ordered or authorized the distress (ante, p. 381).

We have already seen that a warrant from a landlord to a bailiff to distrain the goods of A, does not render the landlord responsible for a wrongful seizure by the bailiff on the adjoining land of B of the goods of B, and that a landlord's warrant to distrain chattels does not render the landlord responsible for a wrongful seizure of fixtures, as in neither of these cases has the landlord given any authority for the doing of the wrongful act (ante, pp. 380, 381).

When proof of special damage is necessary to enable a tenant to maintain an action against his landlord for an irregular distress, or an unlawful detention of things distrained.—We have already seen that the statute 11 Geo. 2, c. 19, s. 19, provides that where a distress has been made for rent justly due, and an irregularity or unlawful act has afterwards been committed by the distrainer or his agents, the distress is not to be deemed unlawful, nor the parties making it trespassers *ab initio*, but that the party aggrieved by the unlawful act or the irregularity, may recover full satisfaction for the special damage he has sustained and no more (ante, p. 370), and that to enable a tenant to maintain an action against his landlord for an irregularity in selling goods distrained, it must be proved that he has sustained actual damage from the wrongful act, and if no such proof is forthcoming, it is the duty of the judge to direct a verdict for the defendant (a).

Proof of waiver of the right of action.—A right of action for an unlawful or excessive distress once vested, can only be destroyed by a release under seal, or by the acceptance and receipt of something in satisfaction of the wrong done (b). A tenant, therefore, does not waive his right of action for an excessive distress, though he afterwards enters into a written agreement with his landlord respecting the sale of the effects seized (c).

Proof of tenancy, and of the relationship of landlord and tenant, as between the plaintiff and defendant, if not admitted upon the record, may be

(a) *Rodgers v. Parker*, 18 C. B. 112; 25 Law, J., C. P. 220. *Lucas v. Tarleton*, 3 H. & N. 116.

(b) Post, ch. 20.

(c) *Willoughby v. Backhouse*, 2 B. & C. 821. *Baylis v. Usher*, 4 M. & P. 790; 7 Bing. 153.

established by parol evidence of the fact, notwithstanding that the tenancy has been created by a lease or agreement in writing not produced (*d*). Proof of payment and acceptance of rent will establish the fact of the relationship of landlord and tenant between the person paying and the party receiving the rent, notwithstanding the existence of a written contract of demise between them not produced (*e*). And "I have no doubt," observes Bayley, J., "that submitting to a distress acknowledges the tenancy. The landlord after distraining cannot bring an ejectment; and the occupier, if he does not replevy, is, I think, precluded from denying the title of the landlord" (*f*). But payment of rent under a distress, is not a conclusive admission of the title of the distrainer. Counter-evidence may be given on the part of the defendant to show that he never had any title (*g*).

Proof of payment of rent by a tenant to an agent of the landlord, who has received it on account of the landlord, and paid it over to him, is evidence against the tenant that he holds of such landlord, although the latter was unknown to him, and he supposed at the time he paid the money that the agent received it on account of another party (*h*). But proof of payment of rent to a particular individual claiming to be entitled to receive it, is only *prima facie* evidence of a tenancy under the claimant, and the presumption of the particular tenancy may be rebutted by proof that the payment was made by mistake or under a false representation (*i*).

Proof of an attornment by the tenant to a receiver appointed by the Court of Chancery, is proof of a tenancy by estoppel as between the tenant and the receiver; but the attornment does not enure to the benefit of the person subsequently declared by the court to be the owner of the property (*k*).

Proof of the nature and terms of a tenancy will best be effected by production of the written demise where the tenant holds under a lease or agreement in writing. If the contract is in the hands of the defendant, the plaintiff who desires to prove the amount of the rent, the time at which, or the circumstances under which it becomes due, should give notice to the defendant to produce it at the trial, in order to let in secondary evidence of its contents (*l*). The old rule of law, that the terms of a tenancy or the amount of the rent can be proved only by the production of the writing when the tenant holds under a written contract

(*d*) *Rex v. Hull*, 7 B. & C. 611; 1 M. & R. 448.

(*e*) *Doe v. Morris*, 12 East, 237, 239 n.

(*f*) *Panton v. Jones*, 3 Campb. 372.

Cooper v. Blandy, 4 M. & Sc. 569; 1 Bing. N. C. 45.

(*g*) *Knight v. Cox*, 18 C. B. 645.

(*h*) *Hutchings v. Thompson*, 5 Exch. 54.

(*i*) *Fenner v. Duplock*, 9 Moore, 40.

(*k*) *Evans v. Matthias*, 7 Ell. & Bl. 590; 26 Law, J., Q. B. 309.

(*l*) *Post*, ch. 20.

of demise, does not exclude evidence of admissions and acknowledgments of those terms made by a defendant holding under a lease in writing not produced. It has recently been held that whatever a party says, or his acts amounting to admissions, are evidence against himself, although they relate to the contents of some deed or writing, and go to prove the nature and contents of a written instrument not produced (*m*). Where, therefore, a defendant held lands under a written demise, it was held that the defendant's verbal declarations of the existence of the tenancy, and of the amount of the rent paid by him to the plaintiff, were admissible in evidence against him, without the production of the writing under which he held (*n*).

Where on the letting of lands the terms of the demise were read from a printed paper by the landlord's agent, and the tenant entered and occupied, and paid rent, it was held that the agent might give oral evidence of the terms, using the printed memorandum to refresh his memory (*o*).

Damages recoverable in actions for distraining and selling the chattels of a tenant when no rent is in arrear.—By 2 W. & M. sess. 1, c. 5, s. 5, it is enacted, that if any distress and sale be made by virtue and under colour of that act for rent pretended to be arrear and due, where no rent is arrear or due to the person distraining, the owner of the goods distrained and sold may by action of trespass, or upon the case against the person distraining, recover double the value of the chattels so distrained and sold, together with full costs of suit. When an action is brought upon this statute for the seizure and sale of goods for rent pretended to be in arrear and due, when in truth no rent is in arrear or due to the person distraining, and the plaintiff claims double the value of the goods distrained, the jury should be directed, if they find for the plaintiff, to ascertain in the first place the actual value of the goods, and then to give damages to the plaintiff to the amount of double the value. If the jury assess the damages generally at a certain sum, and it turns out that they have assessed only the actual value or the single damage, the mistake cannot be rectified, and judgment cannot be entered up for the double or treble value. But if they expressly find and assess only the actual value, the plaintiff may apply to the court to have judgment entered up for double value, according to the statute (*p*).

(*m*) *Slatterie v. Pooley*, 6 M. & W. 668.
Boulter v. Peplow, 9 C. B. 493; 19 Law,
 J., C. P. 193. *Earle v. Picken*, 5 C. & P.
 542.

(*n*) *Howard v. Smith*, 3 M. & Gr. 254;
 3 Sc. N. R. 574.

(*o*) *Ld. Bolton v. Tomlin*, 5 Ad. & E.
 863.

(*p*) *Masters v. Farris*, 1 C. B. 716;
 post, ch. 20. RECOVERY OF DOUBLE AND
 TREBLE DAMAGES.

Whenever the landlord has distrained, without any right or authority to distrain, there is a trespass upon, and injury to the realty, independently of the trespass in regard of the seizure of the chattels, and the tenant is entitled to recover substantial damages for the disturbance of the peaceable possession of his house, as well as for the unlawful seizure of his goods.

Of the recovery of special damage arising from irregularities in levying a distress.—We have already seen that by the express terms of the statute 11 Geo. 2, c. 19, s. 19, the party injured by an unlawful act committed after a lawful distress, is only to recover the amount of damage he has actually sustained. This damage, in the case of a wrongful seizure and sale of growing crops, is the difference between the amount for which the crops would have been sold if the sale had been regular, and what they actually sold for; and where there is no difference, or it is proved that the crops were sold for more than they were worth, no damages are recoverable, and the defendant is entitled to a verdict (*q*).

In an action for selling goods distrained for rent without an appraisement, and without complying with the provisions of 2 Wm. & M., sess. 1, c. 5 (*ante*, p. 370), the measure of damages is the real value of the goods sold minus the rent. The wrong-doers cannot get off by handing over to the plaintiff the mere proceeds of the sale (*r*).

In an action for an excessive distress, where the excess consists wholly in seizing growing crops, the probable produce of which is capable of being estimated at the time of the seizure, the plaintiff is not entitled to recover the full value of the crops beyond the amount for which the distress ought to have been levied. "The true measure of damage is simply a compensation for the additional expense of a distress, and of keeping possession of that part of the crops which it was unnecessary to take during the time of possession; and some compensation for the loss of the absolute ownership and power of disposition for the same time; or if the tenant has replevied, then a compensation for the additional expense and inconvenience of replevying to a greater amount" (*s*).

Where the plaintiff in his declaration for a wrongful distress claimed damages for the loss of divers lodgers, without naming any, Lord Ellenborough refused to allow him to prove that he had in fact lost a lodger, because the name of the lodger had not been specified in the declaration (*t*).

(*q*) *Rodgers v. Parker*, 18 C. B. 112.
Lucas v. Tarleton, 3 H. & N. 116. *Proud-*
love v. Twemlow, 1 Cr. & M. 328.

(*r*) *Knight v. Egerton*, 7 Exch. 407.

Biggins v. Goode, 2 Cr. & J. 367. *Whit-*
worth v. Maden, 2 C. & K. 517.

(*s*) *Piggott v. Birtles*, 1 M. & W. 451.

(*t*) *Westwood v. Cowne*, 1 Stark. 172.

If the landlord takes some things that are distrainable, and other things which are not, this does not render the distress wrongful *ab initio*; but the wrong is limited to the seizure of the goods which were not distrainable, and the tenant is entitled to recover only the actual damage sustained by him from the seizure of those particular chattels (*u*). In respect of the things not distrainable, the distrainer is a trespasser *ab initio*, and the full value of them is recoverable (*x*).

(*u*) *Harvey v. Pocock*, 11 M. & W. 740. Law, J., Exch. 157. See further as to

(*x*) *Keen v. Priest*, 4 H. & N. 236; 28 Damages, post, ch. 21.

CHAPTER XI.

OF ASSAULT AND BATTERY, AND WRONGFUL IMPRISONMENT.

SECTION I.—*Of assault and battery and mayhem.*—What constitutes an assault and battery, and mayhem—Excusable and justifiable assaults—Assaults resulting from negligence—Assaults by constables—Handcuffing unconvicted prisoners—Assault in self-defence, or in defence of the possession of property, or in preservation of the publick peace.

SECTION II.—*Of false imprisonment.*—Constructive imprisonment—Arrest by warrant—Arrest by constables, peace-officers, and private individuals, without warrant—Lawful and unlawful arrests—Arrest under statutory authority, or for the purpose of preserving the publick peace—What amounts to a breach of the peace—Arrest of

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SECTION I.

OF ASSAULT AND BATTERY, AND MAYHEM.

What constitutes an assault.—Every attempt or offer with force and violence to do hurt to another constitutes an assault, such as striking at a person with or without a weapon; holding up a fist in a threatening attitude sufficiently near to be able to strike; presenting a gun or pistol, whether loaded or unloaded, in a hostile and threatening manner, within gun-shot or pistol-shot range, and near enough to create terror and alarm; riding after a man with a whip threatening to beat him, or shaking a whip in a man's face; advancing with hand uplifted in a threatening manner with intent to strike, although the party is stopped before he gets near enough to carry the intention into effect (y); hitting

(y) *Bac. Abr. ASSAULT, Martin v. Shopper*, 3 C. & P. 373. *Stephens v. Myers*, 4 C. & P. 350. *Rex v. St. George*, 9 C. & P. 493.

at one man and unintentionally striking another (*x*); cutting off the hair of a pauper in a poor-house (*a*), throwing water upon the person of another (*b*), and any gesture or threat of violence exhibiting an intention to assault, with the means of carrying that threat into effect (*c*). But as regards threatening gestures, if the parties at the time the gestures are used are so far distant from each other that immediate contact was impossible, there is no assault (*d*).

Words accompanying a threatening gesture may deprive that gesture of the character of an assault. Thus, where a man laid his hand on his sword in a threatening manner, but accompanied the gesture with the words, "If it were not assize-time I would not take such language from you," it was held that the words showed that the party did *not* then intend to use his sword, and that there was no assault (*e*). And Lord Abinger is reported to have held, that if a man presents an unloaded pistol at another, and at the same time says that he does not intend to shoot him, this is no assault (*f*).

The mere touching of a person, without force or violence, for the purpose of drawing his attention to some matter or another, is not an assault, unless it is done in a hostile or insulting manner (*g*), nor is it an assault to push gently against the person of another in endeavouring to make a way through a crowd; but if it is done in a rude and violent manner, or there is any struggling or pushing calculated to do harm, there will be both an assault and a battery (*h*).

An assault must be an act done against the will of the party assaulted, and therefore it cannot be said that a party has been assaulted by his own permission. If the act is done in the course of sport between parties taking liberties with each other by mutual consent, there is no assault (*i*).

Assaults resulting from acts of negligence.—An assault may be committed without any design or intention to commit an assault, for if the person of one man is violently struck through the carelessness and negligence of another, this is an assault, and it is no answer, as we have seen, to say that it was done unintentionally (ante, pp. 237, 238). Thus, if a man drives against, and violently upsets the plaintiff in his carriage, and knocks him down, or overturns the chair in which he was seated, the party thus striking the plaintiff, or knocking him down, is guilty of an assault, although he had no intention to commit an assault (*k*).

(*x*) *James v. Campbell*, 5 C. & P. 372.

(*a*) *Forde v. Skinner*, 4 C. & P. 239.

(*b*) *Pursell v. Horne*, 3 N. & P. 504.

(*c*) *Read v. Coker*, 13 C. B. 860.

(*d*) *Pollock, C. B., Cobbett v. Grey*, 4 Exch. 744.

(*e*) *Turberville v. Savage*, 1 Mod. 3.

(*f*) *Blake v. Barnard*, 9 C. & P. 628.

(*g*) *Coward v. Baddeley*, 4 H. & N. 481; 28 Law, J., Exch. 261.

(*h*) *Cole v. Turner*, 6 Mod. 140.

(*i*) *Christopherson v. Bare*, 11 Q. B. 477. *Reg. v. Martin*, 9 C. & P. 214.

(*k*) *Hopper v. Reeve*, 7 Taunt. 698.

Assaults by constables — Handcuffing unconvicted prisoners.— If a constable orders an unconvicted prisoner to be handcuffed when there is no attempt to escape, nor any reasonable ground to fear a rescue, the constable will be responsible in damages for an assault (l).

Assault and battery.— A battery, as distinguished from an assault, is where the person of a man is actually struck or touched in a violent, angry, rude, or insolent manner (m). If a man is violently jostled out of the way or spat upon (n), or has water, stones, or dirt rudely thrown upon him (o), or has his hat insolently knocked off, or his hair forcibly cut (p), or his horse has been struck so that it ran away and threw him to the ground (q), the party guilty of the violence is liable to an action for an assault and battery. "But every laying on of hands is not a battery. The party's intention must be considered, for people will sometimes, by way of joke or in friendship, clap a man on the back, and it would be ridiculous to say that every such case constitutes a battery" (r). A touch given by a constable's staff in order to engage the attention of a party is not a battery (s).

Mayhem and wounding.— When the assault has been carried to the extent of maiming or crippling, or of wounding a person, it of course becomes of a much more serious character than a common assault, and the party injured will recover heavy damages, unless the maiming or wounding amounts to a felony, or can be justified or excused in the manner presently mentioned. The old word "mayme" or "mayhem," derived from the French word *mayhemer*, or *mehaigner*, was used to signify any hurt done to a man's body, whereby he was rendered less able in fighting either to defend himself or annoy his adversary; such as the cutting off, disabling, or weakening a hand or finger, striking out an eye or foretooth, breaking a bone, or injuring the head, or wounding a sinew, &c. (t).

Of an assault and battery in self-defence.— If the assault is in self-defence, and it can be shown that the plaintiff was the aggressor and assaulted the defendant in the first instance, the action will be answered by a plea of *son assault demesne*, which is a plea alleging that the plaintiff first assaulted the defendant, who thereupon necessarily committed the alleged assault in his own defence. If one man strikes another, and the

(l) Post, ch. 17, s. 2. *Griffin v. Coleman*, 28 Law, J., Exch. 134; 4 H. & N. 285.

Wright v. Court, 4 B. & C. 590.

(m) *Rawlings v. Till*, 3 M. & W. 28.

(n) *Reg. v. Colesworth*, 6 Mod. 172.

(o) *Pursell v. Horn*, 8 Ad. & E. 604; 4 N. & P. 564.

(p) *Forde v. Skinner*, 4 C. & P. 239.

(q) *Dodwell v. Burford*, 1 Mod. 24; Sid. 433.

(r) Ld. Hardwicke, *Williams v. Jones*, Hard. 301.

(s) *Wiffin v. Kincard*, 2 N. R. 472. *Coward v. Baddeley*, ante, p. 395.

(t) Bac. Abr. MAYHEM. Beames's Glanv. p. 350. Bract. lib. 3, tr. 2.

party struck, in the heat of anger, and on the impulse of the moment, returns the blow with a stick or bludgeon, the battery is excusable (*u*), but he has no right to revenge himself, and if, when all the danger is past, he strikes a blow not necessary for his defence, he commits an assault and battery (*x*). If a man strike another who does not immediately after resent it, but takes his opportunity and then some time after falls upon him and beats him, in this case son assault is no good plea, and the second assault cannot be justified (*y*).

Assault in defence of the possession of a house or close, or of goods and chattels.—An assault and battery may be justified in defence of the possession of a house or a close, or a vestry-room, or pulpit (*z*), or in defence of the possession of goods and chattels by the person entitled to the possession and use of them. "If one man enters the house of another with force and violence, the owner of the house may justify turning him out, without a previous request to depart; but if he enters quietly, he must be requested to retire before hands can be lawfully laid upon him to turn him out. If he will not depart after having been requested so to do, the owner may use as much force as is necessary; and if the intruder resists the attempts of the owner of the house to turn him out, he is guilty of an assault upon the latter, and if a policeman standing by sees the resistance and witnesses the assault, he is justified in taking the intruder into custody. A policeman may also, with the authority and at the request of the master of the house, himself proceed to turn out the intruder; but he is not bound to do so unless he pleases, as it is no part of a policeman's duty to do so (*a*).

Assault in defence of the undisturbed possession of a shop or public-house.—If a shopkeeper puts goods into his shop-window, ticketed at a certain price, he is not bound to sell them at the price marked; and if a customer insists upon having the goods, and refuses to leave the shop after having been requested so to do by the shopkeeper or his servants, he may be turned out (*b*). If a man comes into a public-house, and conducts himself in a disorderly manner, and the landlord requests him to go out, and he will not, the landlord may turn him out, though the disturbance does not amount to a breach of the peace. To do this, the landlord may lay hands on him, using no more violence than is necessary to turn him out. If the person resists and lays hands on the landlord, that is an unjustifiable assault upon the landlord (*c*).

(*u*) *Oakes v. Wood*, 3 M. & W. 150.

(*x*) *Coleridge, J., Reg. v. Driscoll*, 1 Car. & M. 214.

(*y*) *Holt, C. J., Cockcroft v. Smith*, 11 Mod. 43.

(*z*) *Jackson v. Courtenay*, 8 Ell. & Bl. 8; 27 Law, J., Q. B. 37; Bro. Abr. Tres-

PASS, pl. 128.

(*a*) *Wheeler v. Whiting*, 9 C. & P. 265.

(*b*) *Timothy v. Simpson*, 6 C. & P. 500.

(*c*) *Howell v. Jackson*, 6 C. & P. 725.
Webster v. Watts, 11 Q. B. 311; 17 Law, J., Q. B. 73.

Of an assault in resistance of a forcible entry on lands or tenements, or to prevent the forcible seizure of goods and chattels.—If one person enters another's house or ground with force and violence, the possessor or occupier of the house may oppose force by force, and turn the party out without a previous request to him to depart (*d*), unless the party making the forcible entry is a constable or officer acting under competent legal authority; for there is a manifest distinction between endeavouring to turn a man out of a house or close into which he has previously entered quietly, and resisting a forcible attempt to enter (*e*). The same rule prevails with regard to a forcible seizure of goods and chattels, for wherever force is used to gain possession of a thing, "the force may be opposed by force without more ado" (*f*), although the party using the force has a right to the possession he seeks to acquire.

Resistance to a forcible entry by a landlord.—A forcible entry is expressly prohibited by the statute 5 Rich. 2, c. 7, even where entry is given by law. And it is laid down, that if a man enters peaceably into a house but turns the party out of possession by force, or by threats frightens him out of possession, this is a forcible entry (*g*). If a tenant who holds over after the expiration of his lease is, *de facto*, in possession of the house; if he is sitting in his drawing-room, or sleeping in his bed, and the landlord walks in at the front-door, the latter cannot be said to be in possession of the house any more than the visitor who comes to make a morning call; and if he lays hands on the tenant and turns him out, he cannot truly say that this was done in defence of his (the landlord's) possession of the house, such possession not having been gained until *after* the exercise of the act of force constituting the assault. But if the tenant, or any other party who has originally lawfully come into possession, voluntarily leaves the premises vacant, the landlord or lawful owner may at once enter, and take and keep possession. The previous possessor is then lawfully dispossessed, and if he re-enters he commits a trespass, and may be turned out of the house or off the land (*h*).

Of assaults in preservation of the public peace.—Any person who witnesses an affray may, during the continuance and for the purpose of putting a stop to it, lay hands on the affrayers (*i*). If he comes up in the midst of the affray, and forcibly interferes as a peacemaker for the purpose of separating the combatants and preventing further violence, he is not

(*d*) *Tulley v. Reed*, 1 C. & P. 6.

(*e*) *Polkinghorn v. Wright*, 8 Q. B. 206.

(*f*) *Green v. Goddard*, 2 Salk. 641; Owen, 150.

(*g*) *Bosanquet, J., Newton v. Harland*, 1 Sc. N. R. 474; 1 M. & Gr. 660; Bae.

ABR. FORCIBLE ENTRY.

(*h*) *Browne v. Dawson*, 12 Ad. & E. 629.

Taylor v. Cole, 3 T. R. 295. *Turinton v. Costar*, 7 T. R. 431. *Butcher v. Butcher*, 7 B. & C. 402.

(*i*) *Noden v. Shores*, 16 Q. B. 218.

guilty of a trespass, unless he uses more violence than is reasonably necessary for the purpose (*k*).

Battery and wounding in self-defence, or in defence of the possession of lands or tenements, or in resisting a forcible entry or the forcible seizure of chattels.—When a person has been assaulted in such a way as to endanger his life, he is of course justified in maiming and wounding the attacking party, and if he has been violently assaulted, or assaulted in such a way as to put him into bodily fear, the mayhem or wounding, if inflicted in self-defence, is held excusable. "A man cannot justify a maim for every assault, as, if A strike B, B cannot justify the drawing his sword and cutting off his hand" (*l*). "If A strike B, and B strike again, and they close immediately, and in the scuffle B maihems A, this maihem is excusable; but if, upon a little blow given by A to B, B gives him a blow that maihems him, this maihem is not excusable."

"Cockroft, an attorney, in a scuffle ran his finger towards the defendant's eye, who bit a joint off the finger: the question was, whether this was a proper defence for the defendant to justify in an action of mayhem; and Holt, C. J., said that a man ought not, in the case of a small assault, give a violent or unsuitable return, but in such a case plead what is necessary for a man's defence, and not who struck first, for hitting a man a little blow with a little stick on the shoulder is not a reason for him to draw a sword, and cut and hew the other" (*m*). To justify a battery, the defendant must show that there was an unlawful resistance on the part of the plaintiff to the lawful acts of the defendant. If the plaintiff complains of repeated blows, of his having been knocked down or wounded, or of his having had his leg broken, it is no answer to say that the plaintiff intruded himself into the defendant's dwelling-house, and made a disturbance, and would not go out, and therefore the defendant knocked him down, or cut his head open with a truncheon, or broke his leg, as no man is justified in resorting to such severe measures to expel an intruder, unless RESISTANCE has been offered; in which case the plea of justification must allege the fact of the resistance, and it must be shown that the force used was no more than was reasonably necessary to overcome such resistance (*n*).

In an action of trespass it was alleged that the defendant overturned a ladder upon which the plaintiff was standing, and threw the plaintiff from it upon the ground, and the defendant pleaded that he was possessed of a house and garden, and that the plaintiff erected a ladder in the garden, and went up the ladder in order to nail a board to the house of the plaintiff;

(*k*) *Timothy v. Simpson*, 6 C. & P. 500.

2 Salk. 641.

(*l*) Per Cur. *Cook v. Beale*, Ld. Raym. 177; 3 Salk. 115.

(*n*) *Gregory v. Hill*, 8 T. R. 399.
Oakes v. Wood, 2 M. & W. 791.

(*m*) *Cockcroft v. Smith*, 11 Mod. 43;

that the defendant forbade the plaintiff so to do, and desired him to come down; and that, upon the plaintiff's persisting in nailing the board, he gently shook the ladder, and gently overturned it, and gently threw the plaintiff from it upon the ground, doing as little damage as possible to the plaintiff, and on demurrer to the plea it was held that the overturning and throwing down of the ladder, however gently, with the plaintiff upon it, was unjustifiable, and the plea bad (o).

SECTION II.

OF FALSE IMPRISONMENT.

Wrongful or false imprisonment is a trespass committed by one man against the person of another, by unlawfully arresting him, and detaining him without any legal authority. Every confinement of the person is an imprisonment, whether it be in a common prison, or a private house, or in the stocks, or by forcibly detaining one in the publick streets. False imprisonment may also arise from the arrest or detention of the person by an officer without a warrant, or by an illegal warrant, or by a legal warrant executed at an unlawful time.

Constructive imprisonment.—Actual contact is not necessary to constitute an imprisonment. Any restraint put upon the freedom of another by show of authority or force, is sufficient to constitute an imprisonment; so that, if a person is restrained from leaving a room, or going out of a house, without the presence of a constable, this infringement of his personal liberty will constitute an imprisonment (p). If a bailiff who has a process against any one says to him, 'You are my prisoner, I have a writ against you,' upon which the party addressed submits, turns back, or goes with him, though the bailiff never touched him, yet it is an arrest, because he submitted to the process (q). If a person is commanded by a constable to go with him, and the order is obeyed, and they walk together in the direction pointed out by the constable, that is constructively an imprisonment, though no actual force be used; for the party addressed feels that he has no option, no more power of going in any but the one direction prescribed to him, than if the constable or bailiff had

(o) *Collins v. Renison*, Say. 138.

(q) *Grainger v. Hill*, 4 Bing. N. C.

(p) *Warner v. Riddiford*, 4 C. B., N. S., 212.

actual hold of him; and it is that entire restraint upon the will which constitutes the imprisonment (*r*). "If you put your hand upon a man, or tell him he must go with you, and he goes, supposing you have the right and the power to compel him, that is an arrest" (*s*). But a partial restraint of the will of a person is not sufficient to constitute an imprisonment. Thus, where a part of a public footway on a bridge was taken and appropriated for seats to view a regatta, and separated for that purpose from the adjoining carriage-road by a temporary fence, and the plaintiff insisted upon a right of way across the part so appropriated, and climbed over the fence, but was stopped by two policemen, who prevented him from proceeding onwards, but at the same time told him he might go back if he pleased, which the plaintiff refused to do, and remained where he was for half-an-hour, it was held that this was no imprisonment (*t*).

Arrest by constables and peace-officers without warrant.—A constable has no power at common law to arrest a person without warrant on suspicion of his having committed a misdemeanour (*u*); but if he has reasonable cause to suspect that a person has committed a felony, he may detain such person until he can be brought before a justice of the peace to have his conduct investigated (*x*). There is no standard or fixed rule as to what is reasonable ground of suspicion which can be laid down as applicable to all cases. "The charge," observes Watson, B., "may be reasonable or unreasonable with reference to the circumstances and the character of the party making it. And while on the one hand a constable ought to be protected in the execution of his duties, he ought on the other to be guided in the discharge of those duties by ordinary reason, care, and caution." Where, therefore, a travelling showman, told the defendant, a police-constable, at a fair, that he had had some harness stolen a year before, and that the stolen harness was on the plaintiff's horse, and directed the constable to take the plaintiff into custody, and the constable went to the plaintiff, and asked him where he got the harness, and the plaintiff gave the common thief's answer—that he had bought the harness of a man he did not know, and had given him a shilling for it, whereupon the constable took the plaintiff into custody, but it appeared that the constable had known the plaintiff for twenty years as a respectable householder; it was held that there was no reasonable cause for the arrest, and that the constable was responsible in damages for a wrongful imprisonment (*y*).

(*r*) Williams, J., *Bird v. Jones*, 7 Q. B. 743; 2 Inst. 589; Bull. N. P. 62.

(*s*) Tindal, C. J., *Wood v. Lane*, 6 C. & P. 774.

(*t*) *Bird v. Jones*, 7 Q. B. 742.

(*u*) *Bowditch v. Balchin*, 5 Exch. 380.

Griffin v. Coleman, 28 Law, J., Exch. 134; 4 H. & N. 265.

(*x*) *Beckwith v. Philby*, 6 B. & C. 635; 9 D. & R. 487.

(*y*) *Hogg v. Ward*, 3 H. & N. 417; 27 Law, J., Exch. 443.

But if one man charges another with having robbed him, and desires a constable to apprehend the suspected thief, and the constable does so without warrant, the constable is not responsible for the imprisonment, because it turns out that the charge is false, and that no felony had in fact been committed (*z*); for if one man charges another with felony, and requires an officer to take him into custody, and carry him before a magistrate, "it would be most mischievous," observes Lord Mansfield, "that the officer should be bound first to try and at his peril exercise his judgment on the truth of the charge. He that makes the charge alone is answerable. The officer does his duty in carrying the accused before a magistrate, who is authorized to examine and commit or discharge" (*a*). If an arrest, by a constable is in its inception wrongful, all other constables who aid and assist in the continuance of the wrongful imprisonment are responsible for the entire damage thereby caused to the plaintiff, although they had no knowledge of the unlawfulness of the imprisonment, and intended to act in strict discharge of their official duty (*b*). Every unlawful detainer of a prisoner after he has gained a right to be discharged is a fresh imprisonment (*c*).

Arrest by private persons without warrant for treason or felony.—"If treason or felony be done," observes Lord Coke, "and one hath just cause of suspicion, this is a good cause and warrant in law for him to arrest any man; but he must show in certainty the cause of his suspicion, and whether the suspicion shall be just or lawful shall be determined by the justices in an action for false imprisonment brought by the party grieved, or upon a *habeas corpus* (*d*). There is this distinction between an arrest for felony by a private individual and a constable. In order to justify the private individual in causing the imprisonment, he must not only make out a reasonable ground of suspicion, but he must prove that a felony has actually been committed by some person or another, and that the circumstances were such that any reasonable person acting without passion or prejudice would have fairly suspected that the plaintiff committed it, or was implicated in it (*e*), whereas a constable, having reasonable ground to suspect that a felony has been committed, is authorized to detain the party suspected until he can be brought before a justice of the peace to have his conduct investigated (*f*).

Arrest by private persons for a misdemeanour.—Regularly no private

(*z*) Hale, P. C., 177, *Davis v. Russell*, 2 M. & P. 607; 5 Bing. 354.

(*a*) *Samuel v. Payne*, 1 Doug. 360.

(*b*) *Griffin v. Coleman*, 4 H. & N. 265; 28 Law, J., Exch. 134. *Wright v. Court*, 4 B. & C. 596.

(*c*) *Withers v. Henley*, Cro. Jac. 379.

(*d*) *Davis v. Russell*, 5 Bing. 357; 2 M. & P. 590.

(*e*) Tindal, C. J., *Allen v. Wright*, 8 C. & P. 526. *Hall v. Booth*, 3 N. & M. 316.

(*f*) Ld. Tenterden, *Beckwith v. Philby*, 6 B. & C. 638; ante, p. 401.

person can of his own authority, without warrant, arrest another for a misdemeanour, except for a breach of the peace, whilst the strife is going on, and to prevent its continuance. But it is said in Hawkins' "Pleas of the Crown," "that any private person may lawfully arrest a suspicious night-walker, and detain him till he make it appear that he is a person of good reputation. Also it hath been adjudged that any one may apprehend a common notorious cheat going about the country with false dice, and being actually caught playing with them, in order to have him before a justice of the peace, for the publick good requires the utmost discouragement of all such persons; and the restraining of private persons from arresting them without a warrant from a magistrate would often give them an opportunity of escaping" (g). "These cases in Hawkins," observes Lord Tenterden, "are where the party is caught in the fact, and the observation there added assumes that the person arrested is guilty. Where the case is only one of suspicion, the arrest is unjustifiable. The instances in Hale of arrest on suspicion, after the act has been done, relate to felony. In cases of misdemeanour, the parties aggrieved should apply to a justice of the peace for a warrant, and not take the law into their own hands" (h).

Arrest of the wrong party—Mistaken identity—Estoppel.—If the party complaining of a wrongful arrest has brought the injury upon himself by his own misstatements and misrepresentations, he has no ground for maintaining an action for damages. If there was lawful ground for arresting A, and B represents himself to be A, and is arrested in consequence of that representation, he has obviously no valid ground for complaining of the imprisonment which naturally resulted from his own act. But after he has given notice that he is not the person he represented himself to be, he cannot lawfully be detained for a greater length of time than may be reasonably necessary to ascertain which of the several statements he has made is in accordance with the truth (i).

Arrest by peace-officers and owners of property under the Malicious Trespass Act.—The statute 7 & 8 Geo. 4, c. 30, for consolidating the laws relative to malicious injuries to property, enacts (s. 28) that any person found committing any offence under that act may be immediately apprehended without a warrant by any peace-officer, or the owner of the property injured, or his servant or any person authorized by him, and forthwith taken before some neighbouring justice of the peace, to be dealt with according to law.

To justify an arrest under this statute, it must be shown that the

(g) Hawkins, P. C. 2, c. 12, s. 20.

(h) *Fox v. Gaunt*, 3 B. & Ad. 800.

(i) *Dunston v. Paterson*, 2 C. B., N. S., 495; 26 Law, J., C. P. 267.

offence prohibited and made punishable was actually committed (*k*), that the plaintiff was found and taken in the act (*l*), and that the party arresting was either the occupier or the landlord of the property injured. It must also be shown that the trespass was a wilful and malicious trespass.

What amounts to a wilful and malicious trespass.—A trespass can only be wilful and malicious where it is committed by a party who knows that he has no claim or pretence of right to enter the land. If he had reasonable ground for supposing that he had a right, his conduct can neither be called wilful nor malicious (*m*).

Arrest by private persons of parties found committing indictable offences in the night.—It is lawful for any private individual to apprehend any one who shall be “found committing” any indictable offence in the night, *i. e.* between 9 P.M. and 6 A.M., and to convey him, or deliver him to some constable or other peace-officer to be conveyed before a justice of the peace, to be dealt with according to law (*n*).

Arrest by constables for an assault and breach of the peace.—A constable may *ex officio* arrest a breaker of the peace in his view, and keep him in his house, or in the stocks, till he can bring him before a justice of the peace. “If A be dangerously hurt, and the common voice is that B hurt him, or if C thereupon come to the constable and tell him that B hurt him, the constable may imprison B till he knows whether A lives or dies, and until he can bring him before a justice. But if there be only an affray, and not in view of the constable, it hath been held he cannot arrest him without warrant” (*o*). If an assault be committed within view of a constable, he has authority to arrest the offender at the time, or as soon after as he conveniently can, so as to come within the expression “recently,” not only to prevent a further breach of the peace, but also to secure the offender for the purpose of taking him before a magistrate (*p*). If a constable is preventing a breach of the peace, and any person stands in his way with intent to hinder him from so doing, the constable is justified in taking such person into custody, but not in giving him a blow (*q*), nor in handcuffing him.

Various statutes provide for the punishment of all persons who shall assault peace-officers or revenue-officers (*r*), metropolitan police-officers (*s*), special constables and district constables (*t*), in the execution of their duty, or aid or incite others so to do.

(*k*) *Parrington v. Moore*, 2 Exch. 225.

(*l*) *Simmons v. Millingen*, 2 C. B. 530.

(*m*) *Looker v. Halcomb*, 12 Moore, 416;
4 Bing. 183.

(*n*) 14 & 15 Vict. cap. 19, s. 11.

(*o*) 1 Hale, P. C. 587.

(*p*) *Reg. v. Light*, 27 Law, J., M. C. 1.

(*q*) *Levy v. Edwards*, 1 C & P. 40.

(*r*) 9 Geo. 4, c. 81, s. 25.

(*s*) 2 & 3 Vict. c. 47, s. 18.

(*t*) 1 & 2 Wm. 4, c. 41, s. 11; 2 & 3
Vict. c. 93, s. 8.

Arrest by private individuals during the continuance of an affray for the purpose of preserving the publick peace.—For the sake of the preservation of the peace, any individual who sees it broken may restrain the liberty of him he sees breaking it, so long as the conduct of such party shows that the publick peace is likely to be endangered by his acts. Any bystander may, and ought to, arrest an affrayer at the moment of the affray, and detain him until his passion be cooled, and then deliver him to a peace-officer, to be carried before a justice of the peace, to be compelled to find sureties for keeping the peace; but a private individual who has witnessed an affray cannot after the affray has ceased lawfully give the affrayers, or one or some of them, into custody, unless the affrayers continue on the spot, and refuse to disperse, and there is a reasonable apprehension of a renewal of the affray (*u*). If the affrayers, on hearing or seeing that the police-constables are coming, run away and disperse, they cannot lawfully be pursued and taken by constables, or given in custody by private individuals, for the affray that is then ended (*x*). If during an affray a bystander calls up a policeman, and directs him to take one of the affrayers into custody, the bystander does not thereby render himself amenable to an action for false imprisonment (*y*).

The continued ringing at a door-bell without cause or excuse does not in itself amount to a breach of the peace, so as to justify the arrest of a party by a private individual; but it is eminently calculated to lead to a breach of the peace, and if it is done and persisted in within view of a constable, the latter may take the aggressor into custody (*z*). And if the nuisance be committed within the metropolitan police district, the offender may, as we have seen, if found in the act, be apprehended by the master of the house (*a*). If a man threatens to force his way into the house of another, and collects a mob at the door, and refuses to go away when directed so to do, the owner of the house is justified in directing a constable to take him into custody, in order to preserve the peace (*b*).

What amounts to a breach of the peace.—It must be shown that there was an actual breach of the peace in order to justify an imprisonment. It is not enough to show that the plaintiff "made a great noise and disturbance, and refused to depart, and was in great heat and fury, ready and desirous to make an affray and commit a breach of the peace" (*c*). Disturbance and annoyance of a publick meeting, by putting questions to

(*u*) *Timothy v. Simpson*, 1 C. M. & R. 757. *Price v. Seeley*, 10 Cl. & Fin. 39.

(*x*) *Baynes v. Brewster*, 2 Q. B. 385.

(*y*) *Derecourt v. Corbishley*, 1 Jur. N. S. 870, Q. B.

(*z*) *Grant v. Moser*, 5 M. & Gr. 123; 6

Sc. N. R. 46.

(*a*) Post, p. 406. *Simmons v. Millingen*, 2 C. B. 524.

(*b*) *Ingle v. Bell*, 1 M. & W. 516.

(*c*) *Wheeler v. Whiting*, 9 C. & P. 262.

the speakers, making observations on their statements, and saying, "That's a lie," do not constitute a breach of the peace (*d*). But if a man comes into a public-house, and makes a very great noise and disturbance therein, and creates alarm and disquiets the neighbourhood, his conduct amounts to a breach of the peace, and justifies the landlord in giving him into custody, if the disturbance occurs within view of a constable (*e*). If a man stops before the door of a dwelling-house or shop, applying abusive and opprobrious epithets to the inmates, and attracts a crowd, and refuses to desist when requested, he commits a breach of the peace (*f*).

Arrest by police-constables and parties acting in their aid for offences committed within the limits of the metropolitan police district.—The statute 2 & 3 Vict. c. 47, s. 54, enables any constable belonging to the metropolitan police force to take into custody, without warrant, any person who, within his view (*g*), shall commit any of the various offences therein specified and forbidden within the limits of the metropolitan police district. Among these offences may be enumerated the exposing to the annoyance of the inhabitants or passengers of horses for show or sale; the exhibition of caravans, shows, or public entertainments; suffering ferocious dogs to go at large unmuzzled, or urging one dog to attack another; negligent driving of cattle or animals; riding on the shafts of carriages without holding the reins; furious driving; wilfully obstructing public crossings and public thoroughfares; riding animals or driving carriages, trucks, or barrows upon, or fastening horses across, footways; rolling any cask, tub, hoop, wheel, &c., upon footways, except for the purpose of crossing them, or loading or unloading carriages; disregarding the police regulations for preventing obstructions in public thoroughfares; posting bills or papers upon walls and buildings without consent of the owner or occupier; using threatening, abusive, or insulting words or behaviour, whereby a breach of the peace may be occasioned; blowing of horns, or any other noisy instrument, for the purpose of calling persons together, or announcing any show or entertainment, or for the purpose of selling articles, or obtaining money or alms; wantonly discharging fire-arms, stones, or other missiles, to the danger of any person; making bonfires, or throwing or setting fire to any firework; wilfully and wantonly disturbing any inhabitant, by pulling or ringing any door-bell, or knocking at any door without lawful excuse, or wilfully and unlawfully extinguishing the light of any lamp; flying a kite, or playing at any game, to the

(*d*) *Wooding v. Ozley*, 9 C. & P. 1.

(*e*) *Howell v. Jackson*, 6 C. & P. 723.
Webster v. Watts, 11 Q. B. 311; 17 Law,
 J., Q. B. 73.

(*f*) *Cohen v. Huskisson*, 2 M. & W.
 482.

(*g*) *Justice v. Gosling*, 21 Law, J., C. P.
 94.

annoyance of the inhabitants and passengers, or making a slide upon the ice or snow in any thoroughfare.

Metropolitan police-constables, and all persons whom they shall call to their assistance, are furthered empowered (s. 68) to arrest, without warrant, any person who, within view of any such constable, shall offend in any manner against that act, and whose name and residence shall be unknown to, and cannot be ascertained by, such constable; also, all disorderly persons disturbing the public peace, whom he shall have good cause to suspect of having committed, or being about to commit, any felony, misdemeanour, or breach of the peace; also, persons charged with aggravated assaults, where he has good reason to believe that the assault has been committed, though not within his view, and that by reason of the recent commission of the offence a warrant could not have been obtained for the apprehension of the offender; also, all persons found committing any offence punishable, either upon indictment, or as a misdemeanour upon summary conviction, by virtue of the statute.

Arrest by private individuals for offences committed within the metropolitan police district.—Any person found committing an offence punishable, either upon indictment or as a misdemeanour, upon summary conviction, by virtue of the Metropolitan Police Act may be apprehended by the owner of the property, on or with respect to which the offence shall be committed, or by his servant, or any person authorized by him, and may be detained until he can be delivered into the custody of a constable, to be dealt with according to law (h). In order to justify a private individual in arresting and detaining an offender within this section, the latter must be actually "found committing" the offence, and must be taken *flagrante delicto*: it is not enough to show that he had committed the offence, however recently. If the offence be, that the party has knocked and rung at a dwelling-house, to the disturbance of the inmates, and the offender has ceased to knock and ring, and has walked away, whether a yard or a quarter of a mile it matters not, he is not within the words or the policy of the section, which only applies where the offender is arrested in the course of committing the offence, and it is necessary to apprehend him in order to prevent a continuance of the nuisance (i).

Arrest by railway companies.—Many acts of parliament, under which railway companies are incorporated, authorize any officer or agent of the company to seize and detain any person whose name and residence shall be unknown, who shall commit any offence against the act, and to convey him with all convenient dispatch before some justice, &c. without any other warrant or authority than that given by the act. These statutes do

(h) 2 & 3 Vict. c. 47, ss. 63, 66.

(i) *Simmons v. Millingen*, 2 C. B. 538.

not authorize railway companies, their officers or agents, to take a person into custody, or to detain him, for riding in a first-class carriage with a second-class ticket, or for riding in a carriage without a ticket, or for refusing to pay his fare when it is demanded, or for mere acts of omission or offences against bye-laws (*k*). Pulling down boards set up by the company, and other injuries to their property, seem to be offences against these statutes, for which parties found in the commission of them are liable to be at once taken into custody, and carried before a magistrate.

Arrest and detention of recruits and deserters under the Mutiny Act.—The Articles of War do not justify the arrest and detention by an officer of any but a recruit or a soldier. The annual Mutiny Act generally enacts, that every person who shall knowingly receive enlistment-money from certain persons employed in the recruiting-service "shall be deemed to be enlisted as a soldier in Her Majesty's service" (*l*). If a party apprehended as a deserter turns out to be a civilian, and not a recruit or soldier, the parties who apprehended him, or ordered, or procured, his imprisonment, will be responsible in damages for the wrong done, for none are bound by the Mutiny Act or the Articles of War except Her Majesty's forces.

Arrest and imprisonment of dangerous lunatics.—A private person may, without any warrant or authority, confine a person disordered in his mind, who seems disposed to do mischief to himself or to any other person (*m*), the restraint being necessary both for the safety of the lunatic and the preservation of the public peace; but as the custody of these unfortunate persons is matter of great public interest, the legislature has, by a series of enactments, established appropriate tribunals and forms of proceeding for ascertaining their exact mental condition, and imposing the necessary restraint upon their actions, under the supervision of public functionaries.

The statutes 8 & 9 Vict. c. 100, and 16 & 17 Vict. c. 96, establish a strict and careful form of proceeding, based upon medical certificates, for the purpose of facilitating the reception of persons of unsound mind, who are dangerous to themselves or to others, in asylums where they are to be properly restrained and treated. If the forms of proceeding prescribed by this act are not strictly complied with, the imprisonment is unlawful (*n*).

The fact of a person's acting so as to appear to be of unsound mind is no justification to another for locking him up as a lunatic. It must be proved that the party imprisoned was, at the time the restraint was put upon him, a dangerous lunatic. The statutes now in force as to the certificates required to be made by the friend of a supposed lunatic and the

(*k*) *Chilton v. Lond. & Croyd. Rail. Co.*, 16 M. & W. 231. *Tollemache v. Lond. & S. W.*, 26 Law, T. R., 222.

(*l*) *Wolton v. Gavin*, 16 Q. B. 48.

(*m*) Bro. Faux Imprisonment, pl. 38;

pl. 25, Bac. Abr.

(*n*) Coleridge, J., *Reg. v. Pinder*; 24 Law, J., Q. B. 148. *Reg. v. Munster*, 20 ib. M. C. 48. *Norris v. Seed*, 3 Exch. 782.

medical men, protect every person acting in pursuance of the act, except the person signing the order for the confinement of the lunatic. The certificates of all the doctors and physicians in the world will not justify one person in taking and confining another as a lunatic, unless it be proved that the party confined was really a dangerous madman, or unless the party justifying the imprisonment is the medical man, or the keeper of the asylum, or his servant, entitled to statutory protection (o).

SECTION III.

OF ACTIONS FOR AN ASSAULT AND BATTERY AND FALSE IMPRISONMENT.

Of the statutory protection to constables, officers, and their assistants from vexatious actions.—By 7 Jac. 1, c. 5, and 21 Jac. 1, c. 12, s. 5, it is enacted, that if any action upon the case, trespass, battery, or false imprisonment, shall be brought against constables, their deputies or assistants, for or concerning any matter by them done by virtue of their offices, the said action shall be laid within the county where the trespass or fact shall be done or committed, and not elsewhere; and that it shall be lawful for such constables, &c. to plead the general issue, not guilty, and to give any special matter discharging them from liability in evidence to the jury; and that if upon the trial of any such action the plaintiff shall not prove to the jury that the trespass, battery, imprisonment, or other fact or cause of action, was committed or done within the county wherein the action shall be laid, the jury shall find the defendant not guilty, without regard to any evidence on the merits.

By the statute 1 & 2 Wm. 4, c. 41, providing for the appointment of special constables, it is enacted, s. 19, “for the protection of persons acting in execution of the act, that all actions and prosecutions to be commenced against any person for anything done in pursuance of the act, shall be laid and tried in the county where the fact was committed, and shall be commenced within six calendar months after the fact committed, and not otherwise; and notice in writing of such action, and of the cause thereof, shall be given to the defendant one calendar month at least before the commencement of the action; and in any such action the defendant may plead the general issue, and give the act and the special matter in evidence at the trial; and no plaintiff shall recover in any such action if tender of

sufficient amends shall have been made before action brought, or if a sufficient sum of money shall have been paid into court after action by or on behalf of the defendant.

The Municipal Corporations Act (5 & 6 Wm. 4, c. 76), regulating the appointment of constables for boroughs, further provides (s. 76), that the men sworn as such constables shall not only within the borough, but also within the county in which the borough or any part thereof is situate, and in any county within seven miles of the borough, have all such powers and privileges, and be liable to all such duties and responsibilities, as any constable duly appointed then had, or thereafter might have, within his constablewick by virtue of the common law, or of any statutes made or to be made; and s. 113 contains the usual clause for the protection of persons acting in execution of the act, making all actions against such persons triable only in the county where the act was done, limiting them to six months from the accrual of the cause of action, making one calendar month's notice of action essential, and enabling the defendant to plead the general issue, and give special matter of justification or excuse in evidence at the trial, and prohibiting the plaintiff from recovering after tender of sufficient amends before action, or payment of a sufficient sum into court after action.

And by 2 & 3 Vict. c. 93, for the establishment of county and district constables, it is provided (s. 8) that the chief constable, and other constables appointed under that act, shall have all the powers, privileges, and duties throughout the county, and in all liberties, franchises, and detached parts of counties locally situate within the county, and also in any adjoining county, which any constable has within his constablewick, by virtue of the common law, or any statute made or to be made (*p*), and every protective provision of the stat. 1 & 2 Wm. 4, c. 41 (ante, p. 409) is to be deemed to extend to the constables appointed under that act. This statute is amended by 2 & 3 Vict. c. 93, which provides for the consolidation of county and borough police establishments, and of their mutual powers, privileges, and duties throughout counties and boroughs; and the stat. 19 & 20 Vict. c. 69, for rendering more effectual the police in counties and boroughs, makes (s. 15) further provision for the consolidation of county and borough police, their powers, privileges, duties, and responsibilities; and by 20 Vict. c. 2, s. 4, the statutes 2 & 3 Vict. c. 93, 3 & 4 Vict. c. 88, and 19 & 20 Vict. c. 69, are to be construed together as one act.

Of particular statutes containing protective clauses for the benefit of constables and officers acting in the execution of the act.—Most acts of parlia-

(*p*) *Mellor v. Leather*, 1 Ell. & Bl. 623.

ment conferring special powers and authorities upon constables and officers for the accomplishment of particular purposes, contain the usual protective clauses for the benefit of persons acting in the execution of the act; making the cause of action local, and requiring the action to be commenced within a certain limited period, and notice of action to be given; and enabling the defendant to plead the general issue, and give the special circumstances of justification in evidence; and prohibiting the plaintiff from recovering after tender of amends. This is the case with the annual Mutiny Act, the Larceny Act (*q*), the Malicious Trespass Act (*ante*, p. 403), the Metropolitan Police Act (*ante*, p. 406), the Game Acts, the Statute for the Prevention of Cruelty to Animals (*r*), the Revenue, Excise, and Customs Acts, the Publick Health Act, and various statutes, enabling constables and private individuals to arrest persons found in the commission of a felonious or prohibited act.

Of the limitation of actions, and notice of action against constables and officers, and against private individuals.—Protective clauses in acts of parliament in favour of constables and officers acting in the execution of their offices, or in favour of constables or of private individuals acting in the execution or in pursuance of particular acts of parliament, are intended for the benefit of those who want to act rightly, but have by mistake done wrong. It has been frequently observed by the courts, that the notice which is directed to be given to constables and officers before actions brought against them is of no use to them when they have acted within the strict line of their duty, and was only required for the purpose of protecting them in those cases where they intended to act within it, but by mistake exceeded it (*s*). “The object,” observes Lord Ellenborough, “clearly is to protect persons acting illegally, but in supposed pursuance, and with a *bond fide* intention, of discharging their duty under the act of parliament. Where the law is not exceeded the protection is not required” (*t*). “It is not wanted,” observes Jervis, C. J., “by those who are in the right, and have a perfect justification under the act of parliament, but by those who are in the wrong, in order that they may have an opportunity of tendering amends (*post*, p. 415). If the defendant *bond fide* believed that he was acting in pursuance of the statute, and in the exercise of a legal right, that is all that is necessary to entitle him to notice of action. It is not necessary that he should know the act, chapter, and verse.” “Whether he had reasonable grounds for believing,” further observes Maule, J., “that he was acting in pursuance of the statute, may

(*q*) 7 & 8 Geo. 4, c. 29, s. 75. *Rudd v. Hurd*, 4 T. R. 555.
Scott, 2 Sc. N. R. 631.

(*r*) *Hopkins v. Crowe*, 4 Ad. & E. 774.

(*t*) *Theobald v. Crichmore*, 1 B. & Ald. 229.

(*s*) Per Lord Kenyon, C. J. *Greenway*.

be very fit to be considered when the question is as to his *bona fides*, for a case may be supposed where there is such a want of reasonable ground for belief as to negative his *bona fides* (u). In order to establish a claim to the statutory protection, it must appear that the act done was of that nature and description that the party doing it might reasonably suppose that the act of parliament gave him authority to do it (x). Where there is no reasonable ground for supposing that the act done is authorized, the party is not protected by the statute, and notice of action is not requisite (y). Where the owner of property, injured by the act of another, *bona fide* supposes that he has a right to give the person injuring his property into custody, and there is a fair colour for the proceeding, he is entitled to notice of action under the Malicious Trespass Act, though he was altogether mistaken in the assertion of his rights, and cannot justify the trespass under the statute (z). The protection afforded by the statute is not strictly confined to the owner of the property injured, but is extended to all persons who had a *bona fide* belief, founded on fair and reasonable grounds, that they filled the character mentioned in the statute, and acted under that belief (a). If the plaintiff was found in the act of committing a malicious trespass, and the defendant had reasonable ground for believing that he had authority from the owner of the property to interfere, and take or give the plaintiff into custody, the defendant will be entitled to notice of action (b). But as the statute only authorizes the arrest of persons "found committing an offence within the statute," the defendant must, if the plaintiff was not taken *flagrante delicto*, show that a malicious trespass had been committed; that the plaintiff was on the spot; that there was reasonable ground for believing that the mischief was still going on, and that the plaintiff was the author or instigator of it (c). "Several decisions have established that *bona fides* is not alone sufficient to bring a case within the privileges of these acts of parliament" (d). If there is no pretence or colour for the notion that the injurious act was done in execution of the statute under which the defendant shelters himself, he could have had no fair and reasonable ground for supposing that he was privileged and protected, and cannot, consequently, claim protection (e).

(u) *Read v. Coker*, 22 Law, J., C. P. 205; 13 C. B. 861. *Booth v. Olive*, 10 ib. 827; L. M. & P. 283. *Horn v. Thornborough*, 3 Exch. 850. *Smith v. Hopper*, 9 Q. B. 1014. *Cox v. Reid*, 13 Q. B. 558. *Hughes v. Buckland*, 15 M. & W. 353. *Kine v. Evershed*, 10 Q. B. 150.

(x) *Rudd v. Scott*, 2 Sc. N. R. 633.

(y) *Cook v. Leonard*, 6 B. & C. 356.

(z) *Beachy v. Sides*, 9 B. & C. 809.

(a) *Hughes v. Buckland*, 15 M. & W.

346. *Horn v. Thornborough*, 3 Exch. 849.

(b) *Kine v. Evershed*, 10 Q. B. 150.

(c) *Cann v. Clipperton*, 10 Ad. & E. 588. *Ballinger v. Ferris*, 1 M. & W. 631.

(d) *Ld. Denman, C. J., Smith v. Hopper*, 9 Q. B. 1014. *Cook v. Leonard*, 6 B. & C. 351. *Home v. Grimble*, Car. & M. 23.

(e) *Shatwell v. Hall*, 10 M. & W. 525. *Eliot v. Allen*, 1 C. B. 37.

"It would be wild work," observes Williams, J., "if a party might give himself protection by merely saying that he believed himself to be acting in pursuance of a statute. Still, protecting clauses of this sort would be useless if it were necessary that the person claiming the benefit of them should have acted quite rightly. The case to which they refer must lie between a mere foolish imagination and a perfect observance of the statute" (*f*).

When the privilege is accorded to a person who fills a particular character and situation, the defendant, who claims the privilege on the ground that he acted in good faith on the belief that he was clothed with the official character, must show some reasonable ground for his belief. A general persuasion that the defendant had the power he claimed to exercise will not entitle him to the privilege, but a mistaken opinion on any of the facts which must exist to give him the power will not deprive him of his right to the protection of the statute (*g*). If, as a reasonably reflecting and careful person, he must have known that he was not clothed with the requisite official character, he has no ground for claiming the protection of notice of action (*h*).

Notice of action to persons acting in execution of the Metropolitan Police Act.—The 79th section of the Metropolitan Police Act (2 & 3 Vict. c. 47) enacts, that that act is to be construed as one act with the 10 Geo. 4, c. 44, the 41st section of which provides that notice of action must be given to all persons acting in the execution of that act. If, therefore, a party has reasonable grounds for believing that he is entitled to arrest a person found committing an act prohibited by the Metropolitan Police Act, he is entitled to notice of action (*i*).

Parties acting in aid of a constable, so as to be entitled to the benefit of the protection.—A person who acts as a prime mover and principal in setting a constable in motion who commands, the constable, instead of being commanded by the latter, is not acting in aid of such constable, and is not entitled to the benefit of the statute (*k*); but he who acts only when required by the constable to assist him, is within the protecting clauses of the statutes.

Of the length of notice required.—By the statute 5 & 6 Vict. c. 97, s. 4, it is enacted, that in all cases where notice of action is required to be given, such notice shall be given one calendar month at least before any action shall be commenced, and such notice shall be sufficient, any act to

(*f*) *Cann v. Clipperton*, 10 Ad. & E. 589. *Hopkins v. Crowe*, 4 Ad. & E. 777.

(*g*) *Kine v. Evershed*, 10 Q. B. 150.

(*h*) *Lidster v. Borrow*, 9 Ad. & E. 654. *Booth v. Clive*, 10 C. B. 835.

(*i*) *Danvers v. Morgan*, 1 Jur. N. S. Exch. 1051; see 2 & 3 Vict. c. 71, ss. 52, 53.

(*k*) *Straight v. Gee*, 2 Stark. 440; post, pp. 416, 417.

the contrary thereof notwithstanding. In the computation of the calendar month, the day of giving the notice and the day of suing out the writ are both to be excluded, for otherwise the intervening period is not a whole month as required by the statute (*l*).

Of the statement of the cause of action on the face of the notice of action.—A notice of action against a constable or officer should set forth the substantial ground of complaint against him, and should specify the time and place of the commission of the grievance (*m*). If the notice contains a reference to a wrong statute, the wrong reference may be rejected, as a reference to the statute requiring notice to be given is not an essential part of the notice (*n*); but the court in which the action is brought, if stated at all, should be correctly stated, particularly if several notices of action have been served (*o*). It is not necessary in the notice to name all the persons meant to be made parties to the action, nor to express whether it is intended to be brought against several persons jointly, or against one person only (*p*), but every plaintiff who sues must give notice of action, and every defendant must receive notice. Notice on behalf of two complaining parties, one of them being dead, was held not to support an action brought by the survivor (*q*). It is quite sufficient if the notice affords plain and substantial information of the cause of action; it is not necessary to describe in specific words precisely how the injury took place; nor is it in all cases material to state precisely where the cause of injury arose (*r*). When the statute requires the name and place of abode of the attorney of the party giving the notice to be indorsed on the notice, any material error or misstatement calculated to mislead will invalidate the notice; but if the information given is sufficiently specific and sufficiently accurate to enable the defendant to avail himself of the privileges and advantage that the act intended to confer upon him, it will be sufficient, and it is for the defendant to show that the error or misstatement, or insufficient description on the notice, has deprived him of the opportunity of taking advantage of the statute (*s*). The christian name of the attorney need not be written out at full length (*t*), nor need his private residence be specified; for the place where an attorney abides for the purpose of carrying on his business is his place of abode within the meaning of the statute. "Either will do, the place of residence or

(*l*) *Young v. Higgon*, 6 M. & W. 40.

(*m*) *Breese v. Jerdein*, 4 Q. B. 585.
Martins v. Upcher, 3 Q. B. 668. *Taylor v. Neayfield*, 23 Law J., M. C. 169; *ib. Q. B.* 371. *Jones v. Nicholls*, 13 M. & W. 361.

(*n*) *Macgregor v. Galsworthy*, 1 C. & K. 8.

(*o*) *Elstob v. Wright*, 3 C. & K. 35.

(*p*) *Baz v. Jones*, 5 Pr. 168.

(*q*) *Pilkington v. Riley*, 3 Exch. 741.

(*r*) *Jones v. Bird*, 1 D. & R. 503; 5 B. & Ald. 837.

(*s*) *Osborn v. Gough*, 3 B. & P. 554.

(*t*) *James v. Swift*, 4 B. & C. 681.

the place of business" (u). Care must be taken to address the notice to the right parties, and to serve it in the proper quarter (x).

Of tender of amends before action.—The statutes requiring notice of action to be given further provide (ante, p. 410) that no plaintiff shall recover for any wrongful proceeding in execution of the act if tender of sufficient amends shall have been made before action brought, and that if the jury at the trial are of opinion that the plaintiff is not entitled to damages beyond the sum tendered or paid into court, they are to give a verdict for the defendant, and the plaintiff cannot elect to be nonsuited.

Payment of money into court after action.—Every constable and officer, and private person who is entitled to the ordinary statutory protection (ante, pp. 409–411), may, after the action has been commenced, and before issue has been joined, pay money into court, and give evidence of such payment under the plea of Not guilty by statute; and if the jury at the trial are of opinion that the plaintiff is not entitled to damages beyond the sum paid into court, they are bound to give a verdict for the defendant, and the plaintiff cannot elect to be nonsuited, and the defendant's costs are to be paid out of the money paid into court. If the plaintiff accepts such money in satisfaction of the damages, it is to be paid out of court to him, and the defendant is to pay him his taxed costs, and thereupon the action is to be determined (y).

Parties to be made plaintiffs in actions for an assault—Master and servant.—The person actually assaulted is in general the only person who can maintain an action for damages, unless the assault has caused his death, in which case the action, if maintainable, must be brought by his personal representative (ante, p. 254); or unless the party assaulted is a servant, and the master has lost the benefit of his service by reason of the assault, in which case an action for damages is maintainable both by the servant and the master: but the master cannot have an action for the beating unless the battery is so great that, by reason thereof, he loses the services of his servant, but the servant himself, for every small battery, shall have an action; and the reason of the difference is, that the master has not any damage by the personal beating of his servant, but by reason of the loss of service (z).

Where two have a joint interest they may, as we have seen, join in the same action, but they cannot do so where the wrong done to one is no wrong done to the other, as in the case of false imprisonment, or assault

(u) *Roberts v. Williams*, 4 Dowl. P. C. 486; 2 C. M. & R. 561.

(x) *Hider v. Dorrell*, 1 Taunt. 384.

(y) 11 & 12 Vict. c. 44, ss. 9, 11; ante, pp. 409–411.

(z) *Robert Mary's case*, 9 Co. 205.

and battery, where what one man suffers is altogether different from the injury that accrues to another from the same cause (a).*

Of the parties to be made defendants in actions for an assault and false imprisonment.—Every private unofficial person not acting in a judicial capacity, or in the authorized execution of legal process (post, chs. 13, 14), is responsible in damages for a wrongful imprisonment, ordered, directed, or authorized by him (b). He is not responsible for the orders or decrees of judges and justices, before whom he has laid a complaint or made a charge (post, ch. 14); but if he officiously interferes and gives orders or directions to police constables for the imprisonment of the plaintiff, he will be responsible in damages if he is unable to excuse or justify the act. Where the defendant out of spite and ill-will, and for the purpose of getting the plaintiff out of the way, went to the place of rendezvous for the impress service near the Tower, and gave information there which caused the plaintiff to be seized by the press-gang and carried on board the tender, where he was detained until it was discovered that the information was false, and that he had never been in a ship before, it was held that the defendant was liable to an action for false imprisonment at the suit of the plaintiff. "If a person," observes Lord Ellenborough, "causes another to be impressed, he does it at his own peril, and is liable in damages if that person proves not to have been subject to the impress service. If the defendant in this case had said that she believed the plaintiff had been a sailor and was liable to be impressed, leaving it to the officer of the press-gang to make the necessary inquiries, and to act as he should think most advisable, she would not then have been amenable to this action, but she took upon herself positively to aver that the plaintiff was compellable to serve in a king's ship, and caused him to be seized, and she must answer for the consequences (c). Here the party giving the information was the sole moving cause of the arrest, and herself trumped up a false story for the very purpose of wrongfully depriving the plaintiff of his liberty. There is a wide distinction, therefore, between this case and the case of a man who gives *bonâ fide* information, or makes a *bonâ fide* charge against another to a police constable, leaving the constable to make inquiry into the circumstances and act as he may think fit in the matter. Where a felony had been committed in the house of the defendant, and the latter sent for the police and complained of the robbery, and stated various circumstances of suspicion that had come to his knowledge, and the policeman made inquiry into these circumstances, and on his own authority arrested the plaintiff and took him to the police-station, and at

(a) Best, C. J., *Barratt v. Collins*, 10 Moore, 451.

(b) Ante, pp. 241, 244, 246, 255-260.

(c) *Flewster v. Royle*, 1 Campb. 188.

the same time requested the defendant to come to the station and sign the charge-sheet; which he did, charging the plaintiff with the felony: it was held that these facts did not render the defendant responsible for the imprisonment, as charging a person with an offence was a different thing from giving him into custody. "The arrest and detention of the plaintiff," observes Pollock, C. B., "were the acts of the police-officer; and the defendant did nothing more than he was, under the circumstances, bound to do, viz. sign the charge-sheet. He might have been liable if he had acted *malâ fide*, but not otherwise. We ought to take care that people are not put in peril for making a complaint when a crime has been committed. If a charge be made *malâ fide*, there are ample means of redress" (d). But if the defendant gives the plaintiff in charge (e), or directs the policeman to take him into custody, he will be answerable in damages for the imprisonment if he cannot establish a justification (f), and the signing of a charge-sheet by the defendant is *primâ facie* evidence against him that he ordered and directed the arrest (g).

If a party, in answer to inquiries made by a sheriff or his officers, or a constable, gives information which he believes to be true, and does not himself take the initiative by putting the officers of justice in motion, he does not so identify himself with the imprisonment as to make it his act, and is not amenable to an action for damages if the officers, acting upon his information, arrest a wrong party. The officers in such a case act according to their own judgment and discretion in the matter, and upon their own responsibility, taking upon themselves the risk of the information turning out to be incorrect.

In these cases, however, much will depend upon the circumstances under which the information was given, the degree of active interference on the part of the defendant, and the character of the information itself; for there are statements which no man ought to make, and there is information which no person ought to give, without ascertaining beforehand whether it be true or false.

All persons aiding and assisting in the unlawful confinement of another are responsible in damages for the trespass, although they had nothing to do with the original arrest, and had no knowledge that the arrest and imprisonment were unlawful at the time they had a hand in it (h).

(d) *Grinham v. Willey*, 4 H. & N. 490; 28 Law, J., Exch. 242; 7 W. R. 463.

Brown v. Chapman, 6 C. B. 374.

(e) *Hopkins v. Crowe*, 4 Ad. & E. 774. *Wheeler v. Whiting*, 9 C. & P. 262.

(f) *Warner v. Riddiford*, 4 C. B., N. S. 200. *Ashhurst, J., Morgan v. Hughes*, 2

T. R. 231. *Stonehouse v. Elliott*, 6 ib. 315.

(g) *Harris v. Dignum*, 29 Law, J., Exch. 23.

(h) *Griffin v. Coleman*, 29 Law, J., Exch. 137; 4 H. & N. 265.

If a party has been arrested and imprisoned under the authority of legal process which has been set aside as irregular, both the attorney who sued out the process and the client who set the attorney in motion are responsible in damages in an action for an assault and false imprisonment; for as the client gives to the attorney the right to represent him in the conduct of a cause, he is responsible for whatever the attorney does within the scope of his authority. The writ is a justification to the officer of the court who acted under it, and had no option but to obey it (post, ch. 13), but it is no protection, after it has been set aside, to the attorney who sued it out (i), or to the client who set the attorney in motion (k).

Liability of a corporation to an action for an assault.—An action for an assault and battery will be against a corporation whenever the corporation can authorize the act to be done, and it has been done by their orders or authority.

When the subsequent ratification of a wrongful imprisonment renders the ratifying party responsible for the wrong.—An action will lie against every person who has ratified and adopted an act of imprisonment effected or ordered by his servant or agent for his use and benefit, although the imprisonment was effected in the first instance without his knowledge. "But he that agreeth to a trespass after it be done, is no trespasser unless the trespass was done to his use or for his benefit, and then his agreement subsequent amounteth to a commandment" (l).

An imprisonment of a party liable to a railway company for not having paid his fare is an act for the benefit of the company, which may be ratified by the company, but it does not follow, because the attorney of the company attends before a police magistrate to prefer a charge against a party who has been imprisoned by a servant of the company, and brought before the magistrate to answer the charge, that the company ratify and adopt the act of imprisonment (m).

Declarations for an assault and false imprisonment.—The venue or county where an action for an assault and false imprisonment is to be tried, must be stated in the margin of the plaintiff's declaration of his cause of action (n), and the venue is local and must be laid, as we have seen, within the county where the trespass or wrong was done in all actions against justices of the peace, mayors, bailiffs, constables, tax-collectors, churchwardens, overseers and their deputies, and other publick

(i) *Parsons v. Lloyd*, 2 W. Bl. 844.

(k) *Barker v. Braham*, 2 ib. 805; post, ch. 16, s. 2. *Collett v. Foster*, 2 H. & N. 361.

(l) 4 Inst. 317.

(m) *Eastern Counties Rail. Co. v. Broom*, 6 Exch. 327.

(n) Reg. Gen. Hil. T. 16 Vict. 1 Ell. & Bl. App. lxxix. 4.

officers, for anything done by them touching or concerning their offices (o), and in all actions for anything done under the Malicious Trespass Act (p).

When the action is brought pursuant to a notice of action (ante, p. 411), and the action is not maintainable without notice of action, the declaration must disclose the same cause of complaint as is contained in the notice (q).

The short form of declaration in a common case of false imprisonment given in the schedule of the Common Law Procedure Act, 15 & 16 Vict. c. 76, merely alleges "that the defendant assaulted and beat the plaintiff, gave him into custody to a policeman, and caused him to be imprisoned in a police-office."

What may be given in evidence under the plea of NOT GUILTY.—Under the plea of not guilty in an action for an assault, or battery, or wounding, those facts only can be given in evidence which tend to show that the defendant did not do the act complained of (r). Any defence which admits the trespass and seeks to show the fact of its being excusable by some accident, or justifiable, is matter for a special plea (s). If the act complained of has been done by the leave and license or permission of the plaintiff, it is not an assault, and the leave and license may consequently be given in evidence under the plea of not guilty. If two persons agree to play at cricket together, and the one strikes the other with the ball in the course of the game, this is not an assault, for "it is a contradiction in terms to say that the defendant assaulted the plaintiff by the leave and license or permission of the latter" (t).

If two persons proceeding through the streets on foot or on horseback, or driving carriages and horses, run or drive against each other, the question as to which of them caused the collision, or struck the person of the other, is raised by the general issue of not guilty (u). If both are in fault and both caused the collision, so that it is impossible to fasten the wrong and injury exclusively upon the one or the other, the evidence tending to establish such a state of facts is likewise admissible under the plea of not guilty. If the act complained of is the exclusive act of the defendant; if he drives against a horse or carriage which is standing still in the street, or over a drunken man who is lying down on the road, or

(o) 21 Jac. 1, c. 12, s. 5. Touching or concerning their offices means, that they were intending to act under colour of their office, although by error and mistake they did not in point of fact do so. *Staigh v. Gee*, 2 Stark. 448; and see post, ch. 14.

(p) 7 & 8 Geo. 4, c. 80, s. 41. *Thomas*

v. Saunders, 5 B. & Ad. 462.

(q) *Elstob v. Wright*, 3 C. & K. 30.

(r) *Pearcy v. Walter*, 6 C. & P. 232.

(s) *Hall v. Fearnley*, 3 Q. B. 921.

(t) *Christopherson v. Bare*, 11 Q. B. 477.

(u) *Pearcy v. Walter*, 6 C. & P. 232.

over a person who has fallen from the kerb or footway into the carriage-way, and the defendant seeks to set up some excuse or justification on the ground that it was an inevitable accident, he must plead the facts specially on the record (x). But if he seeks to show that the act was not his act, and that he was not a voluntary agent in the matter, the evidence pointing to such a result is admissible under the plea of not guilty. Thus, if a horse being suddenly frightened by a flash of lightning or clap of thunder runs away with his rider, and the latter loses all power and controul over the animal, and is unable to guide him, the injuries inflicted by the ungovernable horse under such circumstances are not injuries done by the rider, and the latter is in substance not guilty of committing them (y). It may be proved, under the plea of not guilty, that the defendant is an officer of the Queen and government, and that the assault was committed by him whilst he was acting in discharge of his publick duty as an officer carrying out the orders of his government (z).

Of the plea of not guilty in actions for false imprisonment.—Every defence which goes to show that the imprisonment complained of was not the act of the defendant is admissible under the plea of not guilty; such as, that the defendant went before a magistrate and preferred his complaint to the magistrate, who thereupon issued his warrant for the apprehension of the defendant (a), or that the defendant accused the plaintiff of embezzlement, and that the plaintiff insisted on having the charge investigated, and accompanied the defendant to a magistrate, who, on hearing the charge, ordered the plaintiff to be placed in the dock as a prisoner, to answer it, and detained him until the charge had been heard, and then dismissed him (b).

Of the plea of not guilty by statute.—Acts of parliament containing clauses for the protection of persons intending to act in the execution of the statute provide, as we have seen (ante, p. 409), that the defendant may give the act and the special matter in evidence under the general issue, and that the acts were done in pursuance or by the authority of the act, and that if they shall appear to be so done, the jury shall find for the defendant. To enable a defendant to avail himself of the plea of not guilty by statute, and to give special circumstances of justification or excuse in evidence under it, he must show that the act complained of was done under the authority and pursuant to the powers and provisions of the statute upon which he relies (c), or if the privilege is given to persons

(x) *Hall v. Fearnley*, 3 Q. B. 919.
Knapp v. Salisbury, 2 Campb. 500. *Cotterill v. Starkey*, 8 C. & P. 691.

(y) *Gibbons v. Pepper*, 2 Salk. 637; 1
 Ld. Raym. 38; 4 Mod. 404.

(z) *Buron v. Denman*, 2 Exch. 167.

(a) *Barber v. Rollinson*, 1 Cr. & M.
 330. *West v. Smallwood*, 3 M. & W.
 421.

(b) *Brown v. Chapman*, 6 C. B. 374.

(c) *Witham Nav. Co. v. Padley*, 4 B. &
 Ad. 69.

holding certain offices, and, being clothed with a certain official character, it must be shown that he had, in point of fact, been appointed to the office (*d*). In every case in which a defendant pleads the general issue, intending to give special matter in evidence under or by virtue of an act of parliament, he must insert in the margin of the plea the words, "by statute," together with the year or years of the reign in which the act of parliament upon which he relies was passed, and the chapter and section of the act, and must specify whether the act is public or otherwise, or he will not be entitled to the benefit of the act; and such memorandum must be inserted in the margin of the issue and of the *nisi prius* record (*e*).

Of the plea of son assault demesne.—The plea of son assault demesne is a plea setting forth that the plaintiff first assaulted the defendant, who thereupon necessarily committed the alleged assault in his own defence (*f*).

Of pleas setting forth a previous hearing and dismissal of a charge of assault by magistrates.—By 9 Geo. 4, c. 31, s. 27, reciting that it is expedient that a summary power of punishing persons for common assaults should be provided, it is enacted, that where any person shall unlawfully assault or beat any other person it shall be lawful for two justices, upon complaint of the party aggrieved, to hear and determine such offence; and if the justices, upon the hearing, shall deem the offence not to be proved, or shall find the assault or battery to have been justified, or so trifling as not to merit punishment, and shall dismiss the complaint, they shall forthwith make out a certificate under their hands, stating the fact of such dismissal, and shall deliver such certificate to the party against whom the complaint was preferred. And if any person (s. 28) shall have obtained such certificate, or having been convicted shall have paid the fine, &c., or suffered the imprisonment awarded, such party shall be released from all further proceedings for the same cause. If a certificate under this statute is relied upon as a defence, it must be specially pleaded (*g*), and shown to have been granted on one of the grounds specified in the act (*h*). If the plaintiff, after the defendant has been summoned before justices, and has appeared and pleaded "not guilty," withdraws his complaint without offering any evidence, and the charge is dismissed, the defendant is entitled to a certificate in the terms of the statute, which will be a complete bar to any subsequent action for the same assault (*i*). If the magistrate takes cognizance of the complaint and decides it to be frivolous, he is bound forthwith to grant a certificate that he has so decided. The grant-

(*d*) *Bush v. Green*, 4 Bing. N. C. 49.

(*e*) Reg. Gen. 16 Vict. App., 1 Ell. & Bl.

(*f*) 15 & 16 Vict. c. 76, Sched. B;

ante, pp. 396, 397.

(*g*) *Harding v. King*, 6 C. & P. 427.

(*h*) *Skuse v. Davis*, 10 Ad. & E. 639.

(*i*) *Tunncliffe v. Tedd*, 5 C. B. 553.

ing or withholding the certificate by the magistrate is not discretionary. The defendant is entitled to it *de jure*, and whether the complainant was present or absent at the time of the grant of such certificate is wholly immaterial (*k*).

The word "forthwith," in s. 27 of the statute, does not mean that the certificate is to be granted forthwith upon the dismissal of the complaint by the magistrate, but forthwith upon the application of the party entitled to the certificate. It is not the duty of the magistrate to grant the certificate not being asked for it, but when the magistrate is asked for it he cannot refuse it; it is a record merely of what he has judicially decided, and is demandable *ex debito justitiæ*. If, therefore, justices refuse to grant the certificate on application made to them, the Court of Queen's Bench will grant a mandamus to compel them to do it (*l*).

Pleas of justification.—When there are several distinct and separate assaults charged in the declaration, the defendant, by his plea of justification, must cover and answer the whole chain of trespasses, and show the circumstances leading to each assault, and exonerating the defendant from liability (*m*), and if any one of the long series of wrongful acts is left unanswered, the plaintiff will be entitled to a verdict (*n*). But where the attendant circumstances afford mere matter of aggravation and amplification of the original trespass, and do not in themselves constitute substantive trespasses, it is sufficient if the defendant justifies the principal act (*o*).

When the trespass is a continuing trespass, consisting of a series of acts connected together, but extending over a considerable interval of time, the acts constituting the entire trespass are divisible, and the defendant may plead not guilty to, or traverse some of them, and justify others. Where the plaintiff's declaration alleged that the defendant entered the plaintiff's house and stayed therein four days, and the defendant set up a justification entitling him to enter and stay two days, to which the plaintiff replied, denying his right to enter at all, but alleging that if he had the right, it was to stay two days only, and that he had stayed two days more without any colour of authority, it was held that the trespass was divisible, and the replication good (*p*). If there are divers counts in the plaintiff's declaration embracing divers assaults, and the defendant by his plea narrows them all to one assault, and justifies

(*k*) *Hancock v. Somes*, 28 Law, J., M. C. 196.

(*l*) *Costar v. Hetherington*, 28 Law, J., M. C. 198, overruling *Rex v. Robinson*, 12 Ad. & E. 672.

(*m*) *M'Curday v. Driscoll*, 1 C. & M. 618. *Stammers v. Yearsley*, 10 Bing. 35.

Noden v. Johnson, 16 Q. B. 218.

(*n*) *Bush v. Parker*, 4 M. & Sc. 588; 1 Bing. N. C. 72.

(*o*) *Taylor v. Cole*, 1 H. Bl. 561.

(*p*) *Loveth v. Smith*, 12 M. & W. 582. *Worth v. Terrington*, 13 M. & W. 789.

that, and the plaintiff takes issue, he is confined to the assault set forth in the plea (q).

Plea of justification of an assault and battery in defence of the possession of a house or land should set forth the defendant's possession of the house, &c., that the plaintiff was trespassing thereon, that the defendant requested him to depart, that the plaintiff refused so to do, and that the defendant thereupon laid his hands on the plaintiff and removed him from the said house, &c., using no more violence than was necessary for the purpose. In an action for assaulting and beating the plaintiff with a stick, the defendant pleaded that he was possessed of a close, and that the plaintiff attempted forcibly to break into and enter the said close, that the defendant resisted and opposed such entrance, and defended his possession of the said close, and if any damage or injury happened to the plaintiff it was occasioned by the defence of the possession of the said close, and it was held that the plea was an answer to the action. "The defendant ought not," it was observed, "in the first instance to begin with striking the plaintiff; but the law allows him, either in defence of his person or possession, to lay his hand on the plaintiff, and then he may say, if any further mischief ensued, it was in consequence of the plaintiff's own act, so that the battery follows from the resistance" (r).

Defence of personal property.—If the assault was committed in defence of the possession of personal property, the plea should set forth the defendant's possession of the property (describing it), and should state that the plaintiff endeavoured to take it out of the possession of the defendant, and that the defendant then prevented him, and in so doing necessarily committed the assault of which the plaintiff complains (s).

Defence of neighbours and friends.—If the assault complained of was committed by the defendant in the necessary and proper defence of a third party from the unlawful violence of the plaintiff, it is justifiable under a plea to the effect that the plaintiff first assaulted A. B., being the child or relative, wife, husband, servant, apprentice, neighbour, or friend of the defendant, and was continuing to do so, whereupon the defendant laid his hands on the plaintiff to defend the said A. B. against the plaintiff, and to prevent him from further assaulting the said A. B. (t).

Moderate correction by parents and masters, and persons in authority.—To an action of trespass for an assault and battery, it is a good plea to plead that the party assaulted was the son of the plaintiff, and was an infant within the age of twenty-one years, still domiciled under the paternal roof, and under the care and controul of the plaintiff, that he

(q) *Gale v. Dalrymple*, R. & M. 118.

(r) *Weaver v. Bush*, 8 T. R. 78.

(s) *Roberts v. Taylor*, 1 C. B. 147.

(t) *Leward v. Baseley*, 1 Ld. Raym. 62;
1 Salk. 407; 3 Salk. 46.

behaved saucily and contumaciously to the plaintiff, and refused to obey his lawful commands, whereupon the plaintiff moderately and in a reasonable manner chastised his said son (*u*); or that the plaintiff was the apprentice of the defendant, and conducted himself improperly and saucily, wherefore the defendant moderately chastised him, as he had a right to do, (*x*); or that the defendant at the time of the assault was the captain of a merchant vessel trading to China, and the plaintiff was a mariner on board the vessel, serving under the orders of the defendant; that the plaintiff conducted himself in a mutinous and disorderly manner, and refused to obey the lawful and necessary commands of the defendant, whereupon the defendant caused the plaintiff to be moderately and properly corrected and flogged (*y*). If the chastisement has been immoderate, the excessive beating must be specially replied.

Pleas of justification of imprisonment.—If a man does any act which is *prima facie* a trespass, he must, unless the act were done under the authority of an act of parliament (ante, pp. 409, 420), justify the act, by showing the authority under which he acted; as, for instance, if there be a judgment against a party, and a process is issued to take him in execution, and the sheriff takes him on that process, he must show his authority for so doing (*z*). A plea of justification of imprisonment, ordered or directed, or authorized by a private individual, on the ground that a felony had been committed, and that there was reasonable ground to suspect the plaintiff of having committed it, must state the particulars of the felony, and set forth circumstances showing a reasonable ground of suspicion against the plaintiff, and reasonable and probable cause for the arrest, in order that the judge may determine whether they amount to reasonable and probable cause for arresting and imprisoning the plaintiff (*a*).

A justification of an imprisonment on the ground that the plaintiff had committed felony, and an abandonment of the plea at the trial, or a failure to prove it, is evidence of malice, and a great aggravation of the original wrong; but a justification of a false imprisonment on the ground that a felony had been committed, and the defendant had reasonable and probable cause to suspect that the plaintiff had been guilty of it, is very different. Such a justification is in the nature of an apology for the defendant's conduct (*b*).

(*u*) *Winterburn v. Brooks*, 2 Car. & Kirw. 16.

(*x*) *Penn v. Ward*, 2 C. M. & R. 398.

(*y*) *Lamb v. Burnett*, 1 Cr. & J. 205.

(*z*) As to pleas of justification of imprisonment under colour of legal process, see post, ch. 13.

(*a*) *Maule, J., West v. Bazendale*, 9 C. B. 152. *Broughton v. Jackson*, 21 Law, J., Q. B. 265. *Mure v. Kaye*, 4 Taunt. 34.

(*b*) *Warwick v. Foulkes*, 12 M. & W. 509.

An imprisonment cannot be justified on the ground that the plaintiff unlawfully entered the defendant's house and made a great noise and disturbance therein, and would not depart when requested so to do, whereupon the defendant sent for a police-officer and gave the plaintiff into custody (*c*). To make the plea good, there must be a direct allegation, either of a breach of the peace, continuing at the time of the giving of the plaintiff in custody, or that a breach of the peace had been committed, and that there was reasonable ground for apprehending its renewal (*d*).

In an action for an assault and false imprisonment the defendant justified, on the ground that he was possessed of a house and shop, that the plaintiff was unlawfully therein, and was requested to depart, which he refused to do, whereupon the defendant gently laid hands on him to remove him, that the plaintiff then assaulted the defendant in the presence of a police-officer, and was given into custody. At the trial it was not shown that any assault had been committed by the plaintiff upon the defendant, and it was held that the imprisonment was unlawful, and the plaintiff entitled to damages (*e*).

If the defendant pleads that he had a right to imprison the plaintiff for a certain reasonable time to preserve the peace, or prevent him from disturbing divine service, the time is divisible, and the plaintiff may by his replication deny that there was any cause for imprisoning him, but that if there was, the imprisonment was for a longer time than was justified by such cause (*f*).

Evidence at the trial—Proof of an assault.—In order to prove an assault, the plaintiff must show that he was actually struck by the defendant, or that the defendant threatened to strike him, or to inflict some injury upon him, having the means of carrying that threat into effect (*ante*, pp. 394, 395). We have already seen that there may be a constructive as well as an actual assault, and that a threatening gesture is, under certain circumstances, sufficient to constitute an assault (*ante*, pp. 394, 395). Where one assault only is charged in the plaintiff's declaration of his cause of complaint, the plaintiff is confined to the proof of one assault. He is not bound to the precise time stated in the declaration, but may prove an assault on another day (*g*). Having, however, proved one assault, he cannot go on to prove other prior or subsequent distinct assaults, for the purpose of enhancing the damages or selecting

(*c*) *Green v. Bartram*, 4 C. P. 308.
Rose v. Wilson, 8 Moore, 362; 1 Bing.
 353.

(*d*) *Grant v. Moser*, 5 M. & Gr. 123;
 6 Sc. N. R. 46. *Price v. Seeley*, 10 Cl.
 & Fin. 39.

(*e*) *Reece v. Taylor*, 4 N. & M. 469.

(*f*) *Worth v. Terrington*, 13 M. & W.
 789.

(*g*) *Cheasley v. Barnes*, 10 East, 80.
Polkinhorn v. Wright, 8 Q. B. 206; Litt.
 sec. 485.

the best to rely upon (h). If the assault is of a continuing nature, and consists of a series of wrongful acts of violence, following one upon the other, so as to constitute one continued wrongful act, then the wrong being of a continuous nature, the various acts of violence may be given in evidence as constituting one continuing trespass (i).

Proof of battery.—In order to prove a battery or beating, it must be shown that the person of the plaintiff was actually touched or struck (ante, pp. 396, 399). But it is not the act of striking or hitting alone that is to be regarded, but the act and intention together, for one man may, as we have seen, push another merely in joke (ante, p. 396). An assault does not, as we have seen, include a battery, but every battery includes an assault.

Proof of an arrest and imprisonment.—It is not necessary in order to constitute an arrest that there should be a power of detention of the party arrested. If, therefore, an officer, in the execution of civil process, touches a person through a window without breaking the premises, this is a good arrest (k). In order to establish the fact of an imprisonment, the plaintiff must prove that some restraint was placed upon his personal freedom by the defendant. We have already seen that an imprisonment may be either actual or constructive, and that proof of personal violence is not necessary to prove an imprisonment. It is sufficient to show that the plaintiff was awed into submission, and that he did submit to a restraint imposed upon his personal liberty (ante, p. 400), and that the defendant was the person who procured or instigated the restraint, and caused it to be imposed upon the plaintiff (ante, p. 416).

A *prima facie* case will be established against a defendant in an action for false imprisonment, by showing that the plaintiff was taken into custody by a policeman, and that the defendant came down to the station-house and signed a charge-sheet accusing the plaintiff of having committed felony (l). It is not absolutely necessary to show that the defendant gave any personal orders or directions to the police touching the arrest, in order to establish a *prima facie* case against the defendant. If it is shown that the defendant made a charge against the plaintiff, and the surrounding circumstances, and the conduct and acts of the defendant or his servants, raise a fair and reasonable presumption that the wrongful act was ordered or directed to be done by the defendant, there is enough to call upon him to answer the charge and rebut the presumption; and if no evidence is

(h) *Stante v. Prickett*, 1 Camp. 472; Bull. N. P. 86. *English v. Purser*, 6 East, 395. *Taylor v. Smith*, 7 Taunt. 156.

(i) *Monkton v. Ashley*, 6 Mod. 38;

Salk. 638. *Burgess v. Freelove*, 2 B. & P. 425.

(k) Anon. 7, Mod. 8. *Sandon v. Jervis*, 28 Law, J., Exch. 156.

(l) *Harris v. Dignum*, ante, p. 417.

offered by him for that purpose the jury are justified in finding him guilty (*m*). If the defendant charged the plaintiff with a felony in the presence of a policeman, and stands by and sees the plaintiff taken into custody, and is silent, this is evidence of the defendant's having authorized or directed the policeman to act in the matter (*n*). But if it appears that he merely made complaint, and gave *bond fide* information to a constable, who inquired into the circumstances, and then made the arrest on his own responsibility, the constable making the arrest, and not the party making the complaint and giving the information, will be responsible for the imprisonment (*o*).

A declaration alleging that the defendant caused the plaintiff to be arrested and imprisoned without reasonable or probable cause, on a false and malicious charge of felony, is a declaration in trespass for an assault and false imprisonment, and not an informal count for a malicious prosecution, and, therefore, requires no evidence of malice or want of reasonable and probable cause (*p*).

Of the defence that the action is brought in the wrong county.—It is in general a good defence that the action is not brought in the county or borough where the cause of action arose, when the action is brought for something done in pursuance of any of the statutes previously enumerated, requiring notice of action to be given (*ante*, p. 409).

Evidence for the defence.—The facts which may be given in evidence under the plea of not guilty, to rebut a *prima facie* case on the part of the plaintiff, have already been pointed out (*ante*, pp. 419–421). If the defendant relies upon a plea of son assault demesne (*ante*, p. 396), he must show an assault by the plaintiff commensurate with the assault charged upon the defendant; for if the assault proved to have been committed by the plaintiff is trifling, and altogether disproportioned to the assault committed by the defendant, and forms no excusable or justifiable cause for it, the plaintiff will be entitled to a verdict (*q*). Where, under a plea of son assault demesne, the defendant proved that the plaintiff got off his horse, and held up his stick, and offered to strike the defendant, and the latter thereupon gave him a beating, it was held that a moderate battery was, by reason of the provocation, justifiable, and that, if the plaintiff relied upon the fact of the defendant's having beaten him more violently than he ought to have done, the excessive beating should have been replied, and specially set forth on the record (*r*). If the plaintiff complains of having

(*m*) *Glynn v. Houston*, 2 Sc. N. R. 554.

(*n*) *Warner v. Riddiford*, 4 C. B., N. S., 200.

(*o*) *Grinham v. Willey*, *ante*, p. 417.

(*p*) *Chivers v. Savage*, 5 Ell. & Bl. 697.
Brandt v. Craddock, 27 Law, J., Exch.

314.

(*q*) *Dean v. Taylor*, 11 Exch. 68. *Cockroft v. Smith*, 1 Salk. 641; *Littledale, J., Reeve v. Taylor*, 4 N. & M. 470.

(*r*) *Dale v. Wood*, 7 Moore, 33. *Penn v. Ward*, 2 C. M. & R. 388.

been struck with a stick by the defendant, the defendant may, under a plea of non assault demesne, show that the plaintiff first struck him with his fist (s).

If the defendant rests his defence upon a plea of the previous hearing and dismissal of the charge by magistrates (ante, p. 421), he must produce the certificate of the fact of the dismissal, signed by two justices, which will be *prima facie* evidence of the dismissal of the complaint, without proof of the genuineness of the signatures of the magistrates who have signed it (t). If the defendant relies upon some plea of justification or excuse (ante, pp. 422-425), he must prove so much of his plea as constitutes an answer to the assault to which it is pleaded. If he does that, it is enough, and he is not bound to prove the residue of his plea (u). If the plea of justification consists of two facts, each of which would, when separately pleaded, amount to a good defence, the plea of justification will be supported if one of these facts only be found by the jury (x).

The usual defences to an action for an assault, and the material circumstances of justification and excuse, have already been considered (ante, pp. 398, 423), also the nature of the evidence requisite to support the various pleas that the assault was in self-defence (ante, pp. 396, 397), or in defence of the possession of a house or close, or of goods and chattels (ante, p. 397), or of the undisturbed enjoyment of a shop or public-house (ante, p. 397), or in resistance of a forcible entry (ante, p. 398), or in preservation of the public peace (ante, p. 398), or in the moderate correction of children, servants, or apprentices (ante, pp. 423, 424), or in defence of some neighbour or friend (ante, p. 423).

When the defendant justifies in defence of his possession of realty or personalty, he must prove the fact of his possession at the time he committed the assault, and that the assault was of a defensive and not an offensive character (y). When he justifies an imprisonment on the ground that a felony had been committed, and sets forth circumstances showing a reasonable ground of suspicion against the plaintiff, and reasonable and probable cause for the arrest (ante, p. 402), "It is for a jury to determine whether the facts set forth on the face of the plea are proved, and for the judge to determine whether or not they amounted to reasonable and probable cause, not for suspecting, but for arresting and imprisoning, the plaintiff" (z).

(s) *Blunt v. Beaumont*, 2 Cr. M. & R. 412. *Oakes v. Wood*, 3 M. & W. 150.

(t) 8 & 9 Vict. c. 118, s. 1; post, ch. 20.

(u) *Atkinson v. Warne*, 1 C. M. & R. 827.

(x) *Spilbury v. Micklethwaite*, 1 Taunt.

149.

(y) Ante, pp. 396-400. *Dean v. Hogg*, 10 Bing. 849.

(z) *Maule, J., West v. Bazendale*, 9 C. B. 152. *Mure v. Kaye*, 4 Taunt. 34. *Broughton v. Jackson*, 21 Law, J., Q. B. 265.

"Probable cause," observes Tindal, C. J., "is no doubt, a question of law, and within the province of a judge to decide; but the jury must not only find the facts which are supposed to constitute probable cause, but they are also warranted in forming their conclusion from those facts; and it is frequently difficult to draw the line between matter of law and matter of fact" (a). If, in the opinion of the judge, founded on facts proved before a jury, there was reasonable ground for suspecting either that the plaintiff had committed, or that he was about to commit, a felony, he cannot recover damages from a constable for arresting and detaining him, although no felony had, in fact, been committed (b).

Of the damages recoverable in actions for an assault and for false imprisonment.—"The court," observes Tindal, C. J., "never interferes with the discretion of the jury as to the amount of damages for an assault and false imprisonment, unless they are grossly excessive or clearly founded upon a mistaken or improper view of the matter" (c). The circumstances of time and place as to when and where the assault was committed, and the degree of personal insult, must be considered in estimating the nature of the offence and the amount of damages. "It is a greater insult to be beaten upon the Royal Exchange than in a private place" (d). Where the assault is accompanied by a false charge, affecting the honour, character, and position in society of the plaintiff, the offence will, of course, be greatly aggravated, and the damages proportionably increased; and if the plaintiff has been assaulted and imprisoned under a false charge of felony where no felony has been committed (ante, p. 402), or where there was no reasonable ground for suspecting and charging the plaintiff, exemplary damages will be recovered.

Circumstances of provocation and excuse may be given in evidence, in mitigation of damages, so long as they do not amount to a justification, and could not be pleaded as such (e). But if they constitute an answer to the action by way of justification for the assault, they must be pleaded, and cannot then be given in evidence in reduction or mitigation of the damages (f). Where, in an action for an assault, it was contended that the blow was unintentionally struck, the defendant intending to strike A, when he accidentally in the scuffle struck B, Bosanquet, J., told the jury that there could be no doubt but that, as the defendant struck the plaintiff, the plaintiff was entitled to a verdict, whether it was done intentionally or

(a) *Davis v. Russell*, 2 M. & P. 604; 5 Bing 354.

(b) *Beckwith v. Philby*, 6 B. & C. 635; 9 D. & R. 487.

(c) *Edgell v. Francis*, 1 Sc. N. R. 121. *Huckle v. Money*, 2 Wils. 206.

(d) *Tullidge v. Wade*, 3 Wils. 18.

(e) Post, ch. 21, s. 1.

(f) *Watson v. Christie*, 2 B. & P. 224. *Speck v. Phillips*, 7 Dowl. 473. *Linford v. Lake*, 3 H. & N. 276.

not, but that the intention was material in determining the amount of damages (*g*). If it be proved that the blow was unintentionally struck, and that an apology was immediately offered, the evidence would tend materially to reduce the amount of damages.

Where the plaintiff, in an action for an assault and false imprisonment, sought to make the defendant responsible for the consequences of a remand by the magistrate, it was held that he was liable only for the first imprisonment and taking before the magistrate, and not for the remand or any subsequent detention thereunder, they being the acts of the justice (*h*); but the defendant will be liable for the injury resulting from the remand in an action for a malicious prosecution (*i*).

Damages recoverable from one of several co-trespassers. — We have already seen that where several persons have associated themselves together in the pursuit of a common object, and they all trespass upon the plaintiff's land in following out the common design, each is answerable for the whole of the damage done by all (*k*). And whenever two persons have so conducted themselves as to be liable to be jointly sued, each is responsible for the injury sustained by their common act. The true criterion of damage in such cases is the whole injury which the plaintiff has sustained from the joint act of all. Where, therefore, two persons have a joint purpose, and thereby make themselves joint-trespassers, and the one beats violently, and the other a little, the real injury is the aggregate of the injury received from both, and each is responsible for all the damage; but the malignant motive of one party cannot be made a ground of aggravation of damage against the other party, who was altogether free from any improper motive (*l*).

Prospective damages. — In all cases of serious assault the jury should take into their consideration, in assessing the damages, the probable future injury that will result to the plaintiff from the act of violence perpetrated by the defendant, for the damages, when given, are taken to embrace all the injurious consequences of the wrongful act, unknown as well as known, which may arise hereafter, as well as those which have arisen, so that the right of action is satisfied by one recovery. Thus, where the plaintiff had received a blow on the head, and sustained little apparent injury, and recovered small damages; and afterwards, and in consequence of the blow, a portion of his skull came away, and it then appeared that the skull had been fractured, and he then brought a second action, which was attempted to be supported on the ground that the

(*g*) *James v. Campbell*, 5 C. & P. 372.

(*h*) *Lock v. Ashton*, 12 Q. B. 876.

(*i*) *Post*, ch. 12.

(*k*) *Hume v. Oldacre*, *ante*, p. 182.

(*l*) *Clark v. Newsam*, 1 Exch. 140.

former recovery was for a mere battery and this for maihem, it was held that no action lay, for there was but one blow, and that was the cause of action in both suits, and not the consequences. And the distinction was pointed out between this case and one of continuing nuisance, where each continuance was a fresh nuisance (*m*). No fresh action, therefore, arises by reason of subsequent new damage resulting from the wrongful act, if the act itself were actionable; for, if the action were brought, all the damages which he ever could recover for that injury could be recovered by the plaintiff in that action if he succeeded (*n*).

Special damages in actions for false imprisonment.—Payment of money to procure the plaintiff's release from custody.—Money paid by the attorney of the plaintiff to procure the release of the plaintiff from an unlawful imprisonment is recoverable as part of the damages naturally and directly resulting from the wrongful act, provided the plaintiff claims them in his declaration, "for a man may say that he has been forced to pay that which another, who is his agent, has been forced to pay for him" (*o*). The allegation that the plaintiff has been forced to pay, &c., is a material allegation, and proof of actual payment is necessary to support it. Every expense that the plaintiff necessarily incurs in order to restore himself to a complete state of freedom from imprisonment is recoverable as part of the damages, if the plaintiff has claimed them in his declaration. Where a plaintiff, by being bailed, obtained only an imperfect release, being in the hands and at the mercy of persons who might at any time render him back to gaol, it was held that the expense of removing himself from that position was only one of the steps necessary for completing his discharge from the original imprisonment, and that, if it were necessary for the plaintiff to set aside an inquisition in order to restore himself to a complete state of freedom, he was entitled to recover the expense thereof, as part of the damages of the original wrongful act (*p*).

Evidence in mitigation of damages.—In an action for false imprisonment in giving the plaintiff to a police-officer it may be shown, in mitigation of damages, that the plaintiff had for several days annoyed and insulted the defendant, by following him about the streets, and telling him to pay his debts (*q*). But all facts and circumstances amounting to a justification, or to a contradiction of a material fact admitted upon the record, must be specially pleaded, and cannot be given in evidence in mitigation of

(*m*) *Fetter v. Beale*, 1 Ld. Raym. 339, 692.

(*n*) Coleridge, J., *Bonomi v. Backhouse*, 27 Law, J., Q. B. 390.

(*o*) *Pritchel v. Boevoy*, 1 Cr. & M. 778.

(*p*) *Foxall v. Barnett*, 2 Ell. & Bl. 298. 29 Law, J., Q. B. 7.

(*q*) *Thomas v. Powell*, 7 C. & P. 807; and see post, ch. 21.

damages (*r*). In an action of assault, therefore, a defendant cannot, under a plea of not guilty, prove that he committed the assault in self-defence, or in fear of his life; and a sheriff who has imprisoned the plaintiff cannot, if he pleads not guilty only, give evidence of his writ in mitigation of damages (*s*).

The recovery of damages in an action for false imprisonment is no bar to an action for a malicious prosecution (*t*).

(*r*) *Linford v. Lake*, 27 Law, J., Exch. 384.

(*s*) *Speck v. Phillips*, 5 M. & W. 281.

(*t*) *Guest v. Warren*, 4 Exch. 379; 23 Law, J., Exch. 121. Taylor's Ev. 1358, 3d ed.; post, ch. 21.

CHAPTER XII.

OF MALICIOUS ARREST, MALICIOUS PROSECUTION, AND MALICIOUS ABUSE OF LEGAL PROCESS.

SECTION I.—*Of malicious arrest and prosecution, and malicious abuse of legal process.*—What amounts to a malicious arrest—Proof of actual custody—Malicious prosecution—What is evidence of malice, and of want of reasonable and probable cause for a criminal prosecution—Malicious complaints before magistrates, causing a warrant to be improperly issued—Malicious prosecution by court-martial—Malicious assertion of a legal right—Malicious and unfounded actions—Malicious executions for more than is due upon a judgment—Maliciously causing an

extent to issue—Malicious proceedings in bankruptcy—Malicious abuse of legal process—Malicious detention of judgment-debtors after tender of the debt and costs.

SECTION II.—*Of actions for malicious arrest and malicious prosecution.*—Actions for a malicious arrest—Effect of the pendency of a rule for a criminal information in respect of the subject-matter of the action—Parties to be made plaintiffs and defendants—Declaration of the cause of action—Pleadings, defences, and evidence—Damages recoverable.

SECTION I.

OF MALICIOUS ARREST, MALICIOUS PROSECUTION, AND MALICIOUS ABUSE OF LEGAL PROCESS.

Malicious arrest.—The very important alteration in the law effected by the statute, 1 & 2 Vict. c. 110, has materially altered the nature of the action for a malicious arrest. By the first section of that statute arrest on mesne process is abolished; but by section 3 it is enacted, that if a plaintiff shall, by the affidavit of himself or of some other person, show to the satisfaction of a judge that he has a cause of action against the defendant to the amount of 20*l.* or upwards, and that there is probable cause for believing that the defendant is about to quit England, then it shall be lawful for the judge, by special order, to direct that the defendant may be held to bail for such sums as the judge may think fit, not exceeding the amount of the debt or damages; and thereupon it shall be

lawful for the plaintiff to make the arrest within the time limited by the order. The defendant when arrested is to remain in custody (s. 4) until he has given bail, or made a deposit to secure the debt and costs. The order for the arrest may be made (s. 5) at any stage of the proceedings, and the party arrested is enabled (s. 6) to apply to a judge or to the court for a rule or order upon the plaintiff, to show cause why he should not be discharged out of custody, and the judge or court may make such order thereon as may seem just.

The foundation therefore on which the liability of a person for a malicious arrest must now rest is, that the party obtaining the order or authority from a judge for the arrest has imposed on the latter by some false statement, some *suggestio falsi* or *suppressio veri*, and has thereby satisfied him not only of the existence of the debt to the requisite amount, but also that there is reasonable ground for supposing the debtor to be about to quit the country. If, without fraud or falsehood, upon an affidavit fairly stating the facts, the party succeeds in satisfying a judge that the defendant is about to quit the country, and so obtains an order for a *capias* to arrest him, he is not liable to an action though the defendant had no such intention.

The party arrested has the power of making an application to a judge or the court praying to be discharged out of custody, and the discharge will be granted as a matter of course if such party succeeds in satisfying the judge or court that he has not, nor ever had, the intention imputed to him; but the discharge affords no ground of action against the party procuring the arrest, if the original order for the arrest was fairly obtained (*u*). Where, however, the facts are not truly stated in the affidavit, and the court or judge has been put in motion without reasonable and probable cause, and the party making the affidavit, or procuring the order for the arrest, was guilty of falsehood in the affidavit, or of culpable negligence in swearing to facts without knowing whether they were true or false, there will be evidence of malice, and he will be responsible in damages (*x*).

Any statements or declarations made by the defendant tending to show that he had no reasonable or probable cause for believing, and did not believe, that the plaintiff was about to quit England, is of course evidence against him to show that he was actuated by malicious motives in procuring the order for the arrest (*y*).

The arrest by a sheriff under a writ from any of the Queen's courts of a person privileged from arrest by reason of attendance as a witness under

(*u*) *Daniels v. Fielding*, 16 M. & W. 207.

(*x*) *Gibbons v. Alison*, 3 C. B. 185.

Ross v. Norman, 5 Exch. 359.

(*y*) *Petrie v. Lamont*, 4 Sc. N. R. 339.

the process of another court, does not form the ground of any action at law, though it is alleged to have been done maliciously (z).

What amounts to a malicious arrest—Proof of actual custody.—Where the party submits to the process, or to the commands of an officer intimating that he is in custody, there is a perfect arrest. Actual contact is not necessary, as we have seen (ante, p. 400), to constitute an arrest. Where the defendant for purposes of extortion had placed a writ in the hands of a sheriff's officer, with instructions to arrest the plaintiff unless he would give up some property, and the officer finding his way to the plaintiff's sick-bed produced the writ and demanded the property, telling the plaintiff that unless it was delivered up to him a man would be left with him, and the plaintiff yielded to the pressure and gave up the property, it was held that these facts amounted in judgment of law to an arrest (a).

Malicious prosecution.—To put the criminal law in force maliciously, and without any reasonable or probable cause, is wrongful; and if thereby another is prejudiced in property or person, there is that conjunction of injury and loss which is the foundation of an action (b). "Malice alone is not sufficient, because a person actuated by the plainest malice may nevertheless have a justifiable reason for the prosecution. On the other hand, the substantiating the accusation is not essential to exonerate the accuser from liability to an action, for he may have good reason to make the charge, and yet be compelled to abandon the prosecution by the death or absence of witnesses, or the difficulty of producing adequate legal proof. The law, therefore, only renders him responsible where malice is combined with want of probable cause" (c). But though abandoning a prosecution be not of itself proof of want of probable cause, yet where the prosecution is persisted in and kept hanging over the head of the plaintiff for a very long time, and is then dropped in the very hour of trial, there is strong ground for supposing that the prosecutor had no justifiable reason for commencing it (d).

What is evidence of malice, and of a want of reasonable and probable cause.—The amount of malice and want of reasonable and probable cause necessary to sustain an action for a malicious prosecution, depends so much upon the particular circumstances of the individual case as to render it impossible to lay down any general rule upon the subject, but the facts ought to satisfy any reasonable mind that the accuser had no ground for

(z) *Magnay v. Burt*, 5 Q. B. 381.

(a) *Grainger v. Hill*, 5 Sc. 580.

(b) *Churchill v. Siggers*, 3 Ell. & Bl.
937.

(c) *Tindal, C. J., Willans v. Taylor*, 6 Bing. 186; 3 M. & P. 350; 2 B. & Ad. 845.

(d) *Gaselee, J., ib.* 100.

the proceeding but his desire to injure the accused (e). If a party prefers an indictment, or sets the criminal law in motion, knowing at the time he does so that he has no reasonable ground for it, that alone is evidence of malice on his part. "By the term malice, is meant any indirect motive of wrong. Any motive other than that of simply instituting a prosecution for the purpose of bringing a person to justice, is a malicious motive on the part of the person who acts under the influence of it. If a case is trumped up out of very weak and flimsy materials, for purposes of annoyance or of frightening other people, and deterring them from committing depredations upon private property, there is no legitimate foundation for a criminal prosecution, and persons who put the criminal law in motion under such circumstances lay themselves open to a charge of being influenced by malice" (f).

From the most express malice, the want of probable cause cannot be implied. A man from a malicious motive may take up a prosecution for real guilt, or he may from circumstances which he really believes proceed upon apparent guilt, and in neither case is he liable to an action. With whatever feelings of malice the defendant may have acted in instituting the prosecution, still, if there was reasonable and probable cause for it in the opinion of the judge, the defendant is entitled to a verdict (g).

Prosecutions by parties who by their conduct and actions manifest a consciousness that the plaintiff is not really guilty of the charge they prefer against him.—Proof of the absence of belief in the truth of the charge by the party making it and putting the criminal law in motion, is almost always involved in the proof of malice. Where the plaintiff complained of a prosecution for perjury, which the defendant had instituted against him for the purpose, as the plaintiff alleged, of suppressing evidence, and it was proved that the defendant, on being told that there was not sufficient ground for the indictment, declared that it was of no matter, and that it would tie up the mouth of the plaintiff in a proceeding in which he would be likely to give evidence against the defendant, it was held that the judge was right in asking the jury whether the prosecutor believed at the time he preferred the indictment that the defendant had really been guilty of perjury, and whether he instituted the prosecution *bonâ fide* under such a belief or from an improper motive, and in telling them that if the defendant had acted from an improper motive they might infer malice (h).

(e) Tindal, C. J., 6 Bing. 186; 2 B. & Ad. 845. *Farmer v. Darling*, 4 Burr. 1972.

(f) *Stevens v. Mid. Rail. Co.* 10 Exch. 356; 28 Law, J., Exch. 328.

(g) Patteson, J., *Turner v. Ambler*, 10 Q. B. 257.

(h) *Haddrick v. Heslop*, 12 Q. B. 267. *Broad v. Ham*, 8 Sc. 50; 5 Bing. N. C. 722.

If a person has been assaulted with a consciousness that, by his own misconduct, he provoked the assault, and has no reasonable ground to complain of it, and he nevertheless prefers an indictment, upon which the plaintiff is tried and acquitted, it is for a jury to say whether the defendant instituted the prosecution with a consciousness that he was wrong; and if they think so, there is a total absence of reasonable and probable cause for it, and evidence from which malice is fairly to be inferred (*i*).

If the defendant appears to have put the criminal law in motion for the purpose of enforcing payment of a debt, or obtaining the restitution of goods unlawfully detained, without having any reasonable ground for preferring a criminal charge, there is evidence of malice, and of want of reasonable and probable cause for the prosecution (*k*).

If a man's own declarations and conduct, or the surrounding circumstances of the case, show that an act, which was made the foundation for a charge of felony, was not believed by the prosecutor himself to be a felony, there is no reasonable or probable cause for a charge of felony. If the circumstances show that the prosecutor believed that a party he proceeded against as a thief took the goods under an erroneous notion that he had a lien upon them, or had a right to take and detain them, there is evidence of malice, and of want of reasonable and probable cause for the prosecution for a felony (*l*). In an action for a malicious prosecution of the plaintiff by the defendant for obtaining goods from the defendant by false pretences, it appeared that the plaintiff, who had been insolvent, went to the shop of the defendant in his absence and obtained five shillings' worth of marble hall-paper from his assistant, saying that it was for Mr. Hills, a neighbour, and that the bill was to be made out to Mr. Hills, which was done, and the bill was delivered to the plaintiff, who took it and the paper away with him; but Mr. Hills had not authorized the plaintiff to get the paper, and would not pay for it, and the defendant was told this a few hours after the paper had been obtained, and knew who the plaintiff was, and where he resided, but made no complaint against him for three months; and being asked the reason, said that the transaction had slipped his memory, until he was going through his books, when, seeing the entry of the paper against Mr. Hills, he went to him, and finding that he still repudiated the transaction, and refused to pay for the paper, he went before a magistrate, and charged the plaintiff with having obtained the paper by false pretences. Upon these facts Wightman, J., asked the jury, first, whether they thought the plaintiff obtained the paper

(i) *Hinton v. Heather*, 14 M. & W. 181.

(k) *Brooks v. Warwick*, 2 Stark, 398.

McDonald v. Rooke, 2 Bing. N. C. 219;

ante, p. 435.

(l) *Hunley v. Simson*, 2 H. & N. 600;

27 Law, J., Exch. 134.

by falsely pretending that it was for Mr. Hills; and this question being answered in the affirmative, they were then asked whether they thought that the defendant, at the time he went before the magistrate, believed that the plaintiff intended to defraud him of the price of the paper; and this question being answered in the negative, Wightman, J., held that there was no reasonable and probable cause for the prosecution (*m*).

Any statements or declarations made by the defendant tending to show that he was actuated by spite and ill-will in instituting the prosecution is of course evidence of malice (*n*). "When a person says to the prosecutor of an indictment for perjury that there really is no case against the man he has indicted, and the prosecutor answers, 'I indict him to stop his mouth,' there is reasonable evidence from which a jury may infer that the prosecutor knows that the man is not guilty, but only indicts him for the purpose he has mentioned" (*o*).

The fact that overseers of the poor have got out a summons before justices, and have caused a warrant of distress and a warrant of arrest to issue against the plaintiff for the non-payment of poor-rates, they knowing at the time that the plaintiff was bankrupt, and had obtained his protection, is no evidence of malice to support an action for a malicious prosecution against the overseers (*p*).

Effect on the question of malice of parties having prosecuted under voluntary compulsion or by the advice of counsel.—It is no answer to an action for a malicious prosecution to show that the defendant was bound over by recognizance to prosecute and give evidence, if it appears that the prosecution originated in malice, and that the recognizance was the result of prior malicious proceedings, instigated by the defendant (*q*). Counsel's opinion is of no avail to a man who has instituted an unfounded and malicious prosecution. "It would be a most pernicious practice," observes Heath, J., "if we were to introduce the principle that a man, by obtaining the opinion of a counsel, by applying to a weak man or an ignorant man, may shelter his malice in bringing an unfounded prosecution" (*r*).

Malicious complaints before magistrates—Malicious causing a justice's warrant to be issued against the plaintiff.—If a defendant maliciously and without reasonable and probable cause has attended before a magistrate and made a complaint, and induced the magistrate to issue a warrant against the plaintiff, the defendant is responsible in damages in an action

(*m*) *Williams v. Banks*, 1 F. & F. 557.

(*n*) *Michell v. Williams*, 11 M. & W. 217.

(*o*) *Maule, J., Heslop v. Chapman*, 28 Law, J., Q. B. 49,

(*p*) *Philips v. Naylor*, 4 H. & N. 565;

27 Law, J., Exch. 222.

(*q*) *Dubois v. Keats*, 11 Ad. & E. 332. But see *Fitz John v. Mackinder*, C. P. Feb. 25, 1860.

(*r*) *Hewlett v. Cruchley*, 5 Taunt. 283.

for a malicious prosecution. If he goes before a magistrate and states that he has just cause to suspect that the plaintiff has robbed him, and upon that representation a warrant is granted, it does not lie in his mouth to say that the magistrate ought not to have granted the warrant; and if he has knowingly made a false charge, and had no real *bond fide* ground of suspicion, he is answerable for it (s). But to show that the defendant was influenced by malice, it must be proved that the charge was wilfully false, or that the statements made by him before the magistrate were untrue to his knowledge, at the time he made them (t), or that they were of such a nature that no well-intentioned person would state them, and found a criminal charge upon them, without ascertaining whether they were true or false, the means of inquiry and of ascertaining the truth being within his reach, if he had thought fit to avail himself of them. "A man may prefer a charge either on the foundation of what he knows or of what he suspects. But there is a wide difference, as it regards both the accuser and the party accused, whether the charge be made on the one ground or the other. That which is founded on the accuser's own knowledge will require proof to that extent to warrant such a charge; whereas that which rests on suspicion only will be satisfied by circumstances sufficient to induce suspicion on the mind of a cautious person." "This distinction," observes Bayley, J., "between a direct charge and one upon suspicion only is well known. I may know that a person has stolen my property by having seen him commit the act, or by having heard him confess it, and in either of these cases the charge would proceed directly from my own knowledge, but information to a less extent might reasonably create in me a suspicion, and then the charge would proceed in a form less direct" (u).

It has been held, that if a party goes and lays his complaint of the loss of his property before a magistrate and tells him of its having been taken or appropriated by the plaintiff, the complaining party is not responsible for what the magistrate may think fit to do upon the strength of this information. If, therefore, the magistrate, acting upon the statement or deposition *bond fide* given, treats the matter as a felony, and issues his warrant for the apprehension of the plaintiff on the charge of felony, and in doing so forms an erroneous judgment, and conceives that to be a felony which is not a felony, but only matter for a civil action, the complaining party, who has thus set the magistrate in motion and caused the warrant to be issued, is not responsible for the erroneous judgment of the magistrate, and the acts consequent thereupon (x). But if there is no reason-

(s) *Else v. Smith*, 1 D. & R. 105.(t) *Cohen v. Morgan*, 6 D. & R. 8.(u) *Davis v. Noake*, 6 M. & S. 32.(x) *Leigh v. Webb*, 3 Esp. 165; ante, pp. 416, 417.

able or probable cause for a charge of felony, and a charge of felony is made, the party preferring the charge will be responsible for it, though he acted under the advice of the magistrate, and preferred the charge at his suggestion.

It is very often a very doubtful question whether a particular offence amounts to a felony, and it often depends upon the fact of the prisoner's having acted with conscious dishonesty, or under a notion of right on his part. But "some persons suppose that no man can lay his hands on goods that do not belong to him without being guilty of felony. If you could get at the bottom of a man's mind, he might say he was justified, because the plaintiff had no right to do it, no matter how honest his intention; but if that is his opinion, it is a blunder on his part, and one of those blunders," observes Bramwell, B., "for which a man who commits it should be punished, as it is very likely that the person charged with felony through the blunder will, as long as he lives, be sometimes asked whether he had not been had up before the magistrate for felony" (y).

It is not necessary, in order to maintain an action against a person for having made a false and unfounded charge of felony against another before a magistrate, to show that the charge was taken down in writing, and acted upon by the magistrate. But it is necessary that the jury should be satisfied that it was made to the magistrate with the view of inducing him to entertain it as a charge of felony (z).

Effect of the continuance by the defendant of proceedings which were originally commenced without his knowledge or authority.—When the proceedings have not been commenced by the defendant, but have only been continued by him, his responsibility commences at the point at which he becomes cognisant of the proceedings. And there is a material distinction between instituting a prosecution and merely attending the hearing upon a proceeding already commenced. It does not at all follow that the defendant, by attending the hearing, adopts the proceeding, or renders himself responsible for the motives or actions of the person who instituted it, although that person may be an agent of the defendant (a).

Effect of the complaint or information before the magistrate, being followed up by a conviction of the plaintiff.—A conviction of the plaintiff by a magistrate, so long as it has not been quashed on appeal, affords a conclusive answer to the charge that the complaint or information which led to it was founded in malice, and was preferred without reasonable or probable cause (b).

(y) *Huntley v. Simson*, 27 Law, J., Exch. 57.
Exch. 137; 2 H. & N. 600.

(z) *Clarke v. Postan*, 6 C. & P. 423.

(a) *Weston v. Beeman*, 27 Law, J.,

Exch. 57.
(b) *Mellor v. Baddeley*, 2 Cr. & M.
678; post, ch. 14.

Maliciously causing a search-warrant to issue.—If a person, without reasonable and probable cause, and from malicious or corrupt motives, causes a search-warrant to issue, he is liable to an action for damages at the suit of the party who has been damnified by the execution of the warrant; but if a party goes before a magistrate, and lays before him fair grounds of suspicion for the magistrate to exercise his judgment upon them, and the magistrate thinks fit, in the exercise of the functions of his office, to issue the warrant, the person so attending before the magistrate is not then responsible for the issue of the warrant, unless he has knowingly or recklessly, and without due inquiry, sworn to what was false (c).

Malicious prosecution by court-martial.—An action for a malicious prosecution will not lie at the suit of a subordinate officer against his commanding officer for maliciously, and without reasonable or probable cause, bringing him to a court-martial, as it is an act done in the course of discipline, and under the powers legally incident to his situation in the publick service (d).

Malicious assertion of a legal right.—The malicious assertion of a legal right is not actionable. "Let a prosecution be never so maliciously carried on, yet if there be probable cause or ground for it, no action for a malicious prosecution will lie" (e). No man can be sued for the exercise of his legal right to issue execution upon a judgment, though it be averred that he acted maliciously, and without reasonable and probable cause (f).

Malicious and unfounded actions.—If one man prosecutes a civil action against another maliciously, and without reasonable and probable cause, an action for damages is not maintainable against the prosecutor of the action. Thus, if one man slanders another in an action in a proper court no action will lie for it (g). There is a great difference between the bringing of an action and indicting maliciously and without cause. When a man brings an action he claims a right to himself, or complains of an injury done to him; and if a man fancies he has a cause of action he may sue and put forward his claim, however false and unfounded it may be. The common law, in order to hinder malicious, and frivolous, and vexatious suits, provided that every plaintiff should find pledges, which were amerced if the claim was false. But that method became disused, and then to supply it the statutes gave costs to the successful defendants. But there was no amercement upon indictments, and the party had not

(c) *Cooper v. Booth*, 3 Esp. 144; cited 1 T. R. 535. *Philips v. Naylor*, 4 H. & N. 565; 27 Law, J., Exch. 222; 28 Law, J., Exch. 225.

(d) *Johnstone v. Sutton*, 1 T. R. 548. *Sutton v. Johnstone*, 1 Bro. P. C. 76.

Floyd v. Barker, 12 Rep. 23. *

(e) *Anon.* 6 Mod. 73.

(f) *Roret v. Lewis*, 5 D. & L. 373.

Magnay v. Burt, 5 Q. B. 394.

(g) *Beauchamp v. Craft*, Keilw. 26.

any remedy to reimburse himself but by action. But if A sues an action against B for mere vexation in some cases upon particular damage, B may have an action, but it is not enough to say that A sued him *false et malitiose*, but he must show the matter of the grievance specially, so that it may appear to the court to be manifestly vexatious (*h*).

Maliciously putting the process of the law in motion in the name of a pauper or insolvent.—No action will lie for improperly promoting a civil action in the name of a third person, unless it was alleged and proved to have been done maliciously, and without reasonable or probable cause (*i*); but if there be malice and want of reasonable or probable cause the action will lie, provided there be also legal damage (*k*). If the plaintiff in an action charges the defendant with having maliciously, and without any reasonable or probable cause, commenced and prosecuted an action against him in the name of a third person for his (the defendant's) own benefit, whereby the plaintiff has sustained damage, and it appears that the party so wrongfully put forward by the defendant was a person in solvent circumstances, the action will be defeated, inasmuch as the award of costs upon the failure of that action would, in contemplation of law, have been a full compensation for the unjust vexation caused by the bringing of the action, and no damage would be deemed to have been sustained; but if it appears that in the previous action there was judgment of non-suit, with an award of costs, and that the plaintiff was a pauper, or an insolvent, and could pay no costs, and that the defendant knew of the insolvency of the plaintiff at the time he induced the latter to bring the action, and had himself no interest in the subject-matter of the suit, there would appear to be a good ground of action (*l*).

Maliciously issuing execution for a larger sum than is due upon a judgment.—Process of execution on a judgment for the purpose of obtaining the sum recorded is *prima facie* lawful, and the judgment creditor cannot be rendered responsible in damages for issuing execution for more than is due upon the judgment, unless some actual damage can be shown to have been sustained by the plaintiff therefrom. It is not enough for the plaintiff to show that he was arrested and kept in custody for the greater amount than was due upon the judgment. He must also prove that by reason of the arrest and detention for the larger sum his imprisonment was prolonged, or the expense of obtaining his discharge increased. His remedy, where the thing has been done inadvertently without malice, is

(*h*) *Savile v. Roberts*, 1 Ld. Raym. 374; 1 Salk. 13.

(*i*) *Flight v. Leman*, 4 Q. B. 883.

(*k*) *Williams, J.*, 11 C. B. 730; 1 Roll. Abr. ACTION FOR CASE, H. pl. 1, p. 101.

(*l*) *Cotterell v. Jones*, 11 C. B. 728, 730;

21 Law, J., C. P. 3. *Atwood v. Monger*, Styles, 378. *Waterer v. Freeman*, Hob. 266. *Savile v. Roberts*, 1 Ld. Raym. 378; 12 Mod. 208. *Pechell v. Watson*, 8 M. & W. 691.

to apply to the court, or a judge, that he may be discharged, and that satisfaction may be entered up on payment of the balance justly due. "But it would not be creditable to our jurisprudence," observes Lord Campbell, "if the debtor had no remedy by action where his person or his goods have been taken in execution for a larger sum than remained due upon the judgment, the judgment creditor knowing the sum for which execution is sued out to be excessive, and his motive being to oppress or injure his debtor. The court or judge to whom summary application is made for the debtor's liberation can give no redress beyond putting an end to the process of execution on payment of the sum due, although by the excess the debtor may have suffered a long imprisonment, and have been utterly ruined in his circumstances" (m).

Maliciously causing an extent to be issued against the plaintiff.—If a defendant, from feelings of ill-will, and with a view to annoy and injure the plaintiff, prays an extent to secure a debt due from the plaintiff to the crown, under the pretence that the debt is in danger of being lost to the crown, when he knows it not to be in danger, or has no reasonable or probable cause for believing it to be in danger, he will be responsible in damages in an action for a malicious prosecution. Such a proceeding is calculated to affect the plaintiff's credit, and bring demands upon him, and be productive of injurious and even ruinous consequences to him. In the action for the malicious prosecution, the law requires that the writ of extent should be traced to its close, and that may be done by showing it to be discharged by the court, though upon an arrangement, and by consent (n).

Malicious proceedings in bankruptcy.—An action for a malicious prosecution will lie against persons who petition for an adjudication in bankruptcy, without reasonable or probable cause, and knowingly and wilfully, or recklessly, swear to depositions false in fact (o). In order to prove a want of reasonable or probable cause, the proceedings must be superseded or set aside before the commencement of the action, for the very existence of a commission of bankruptcy has been held to be evidence of probable cause (p). The mere fact of the proceedings having been superseded or set aside, does not of itself establish the fact of the want of probable cause for them, and the plaintiff must give some *prima facie* evidence of want of probable cause, in order to put the defendant upon proof of the existence of probable cause (q).

(m) *Churchill v. Siggers*, 3 Ell. & Bl. 938; 23 Law, J., Q. B. 308. *Jenings v. Florence*, 2 C. B. 467; 26 ib. C. P. 277. *Wentworth v. Bullen*, 9 B. & C. 849.

(n) *Craig v. Hasell*, 4 Q. B. 492.

(o) *Farley v. Danks*, 4 Ell. & Bl. 499. *Brown v. Chapman*, 1 W. Bl. 427.

(p) *Whitworth v. Hall*, 2 B. & Ad. 698.

(q) *Hay v. Weakley*, 5 C. & P. 361. *Cotton v. James*, 1 B. & Ad. 134.

Malicious abuse of legal process.—Whoever makes use of the process of the court for some private purpose of his own, not warranted by the exigency of the writ or the order of the court, is amenable to an action for damages for an abuse of the process of the court. Thus, where the defendant having instituted legal proceedings against the plaintiff, and caused a writ to be issued against him, employed the officer charged with the execution of the process to do a specific thing that he was not warranted by the writ to do, viz. to use it as a means of compelling the plaintiff to give up a ship's register, it was held that the defendant was responsible in damages to the plaintiff for causing him to be arrested and detained until he had given up the register, and for the injury he had sustained in being deprived of the register which he had given up to obtain his release from custody. And when the complaint is, that the process of the law has been abused and prostituted to an illegal purpose, it is perfectly immaterial whether or not it issued for a just cause of action, or whether the suit was legally terminated or not (r).

Malicious detention of judgment debtors after tender of the debt and costs.—The Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), authorizes the sheriff, gaoler, or person in whose custody a prisoner may be, under a writ of ca. sa. to discharge such prisoner on receiving an order in writing from the attorney in the cause; but the attorney is not to give the discharge without the consent of his client, nor is the sheriff, or gaoler, or person having the prisoner in custody, to liberate him, if the judgment creditor gives him notice not to do it. If, therefore, the latter, after tender of the amount of the judgment debt and costs, refuses to consent to the discharge of the prisoner, or interferes to prevent his liberation, he will be guilty of a wrongful act, and may render himself liable to an action for maliciously refusing to discharge the prisoner, and detaining him unlawfully in custody (s).

SECTION II.

OF ACTIONS FOR MALICIOUS ARREST AND MALICIOUS PROSECUTION.

Actions for a malicious arrest are maintainable, as we have seen, whenever a party has obtained an order or authority from a judge to make an

(r) *Grainger v. Hill*, 5 Sc. 580; 4 Bing. N. C. 212. *Heywood v. Collinge*, 9 Ad. &

E. 274.

(s) *Orozer v. Pilling*, 4 B. & C. 26.

arrest, by imposing some false statement upon the judge knowingly and designedly, and for the purpose of obtaining some undue advantage, or by stating certain facts as being true within his knowledge, when he knew nothing about them, or his belief in the truth of a particular statement, when he had no reasonable or probable cause for his belief (post, ch. 17, s. 1.) We have seen, also, that an action is maintainable by a judgment debtor who has been arrested and imprisoned for more than is due upon the judgment, if his imprisonment has thereby been prolonged, or the expense of his obtaining his discharge has been increased, and actual damage can be proved to have been sustained by him from the commission of the wrongful act (ante, pp. 442, 443). "It is obvious," observes *Ld. Campbell*, "to common sense, that a debtor may be grievously damnified by reason of the execution under a ca. sa. being for the full amount of the sum recovered by the judgment, where only a very small sum is due; his imprisonment is thereby likely to be greatly prolonged, and though, by the mere force of the writ, the sheriff is not authorized to receive the money, to levy which is the great object of the execution, it is well known, and may be capable of proof, that in practice the attorney for the judgment creditor may name a special bailiff, to whom the warrant is to be directed, and that he is authorized to discharge the debtor on payment of the sum endorsed on the warrant, to be levied with poundage and other expenses. At any rate, it is quite clear that, by a declaration on the warrant that the whole sum recovered is to be levied, although the greatest part of it has been paid, the debtor must be greatly embarrassed and delayed in raising the small balance remaining due, and in applying for his discharge" (t). We think, therefore, that an action is maintainable whenever execution has been sued, and the person or goods of the judgment debtor have been taken in execution for a larger sum than remained due upon the judgment, this being shown to be done maliciously, and without reasonable and probable cause, and to have produced actual damage to the judgment debtor.

Effect of the pendency of a rule for a criminal information against the defendant on the prosecution of the plaintiff for the subject-matter of a civil action brought by the plaintiff.—The mere fact of a criminal information being pending against the defendant on the prosecution of the plaintiff, for the same subject-matter, is no ground for staying the proceedings on the action; but if the plaintiff has resorted to his private remedy, by way of action, the court will not in general allow him to proceed with the criminal information until the action has been discontinued (u).

Parties to be made defendants—Liabilities of persons who stir up or

(t) *Churchill v. Siggers*, 3 Ell. & Bl. 920; 23 Law, J., Q. B. 311.

(u) *Caddy v. Barlow*, 1 M. & R. 278. *Rez v. Sparrow*, 2 T. R. 198.

instigate an unfounded and malicious prosecution—Principal and agent—Attorney and client.—It is immaterial whether the defendant alone makes the charge, or whether he stirs up and procures another to do it. In either case he is liable in damages (x). If, for the gratification of his malice, a man gives his agent a plenary authority to institute a prosecution against another, he is equally responsible for all that is done under it, and if the agent have no cause for the proceeding, the principal is responsible, for it is his duty to inquire whether the proceeding be well founded or not. If, as against the agent, there was an absence of reasonable and probable cause for the prosecution, that is sufficient as against the principal, by whose authority and direction the agent acted (y). But if the agent institutes the proceeding of his own head, and without the instigation or direction of the principal, the latter will not be responsible for the unauthorized proceedings of his agent, unless he adopts them and continues them with knowledge of all the circumstances. When proceedings have been commenced by an agent without the knowledge of the principal, the responsibility of the latter commences at the point at which he becomes cognisant of the proceedings (z).

If an attorney maliciously, and without reasonable and probable cause, knowing that his client has no just claim against the plaintiff, assists in putting the law in motion, and effects an unlawful and malicious arrest, he, as well as his client who has authorized the proceeding, will be responsible in damages (a).

If, in an action for a malicious prosecution against A and B, supported by proof that both A and B entered into a joint recognizance to prosecute and give evidence, it appear that A only employed the attorney, and that B attended before the magistrate and the grand jury at the request of the attorney, B will be entitled to an acquittal (b).

A railway company is not liable for a malicious prosecution instituted by their servant without the knowledge or direction of the company, and a doubt has been thrown out as to whether a corporation can be actuated by that sort of malice that is essential to the maintenance of an action for a malicious prosecution (c).

Declarations for a malicious arrest under a judge's order should show that the defendant went before one of the judges of the superior courts, and falsely and maliciously, and without any reasonable or probable cause, represented and pretended to the judge that the defendant, or some third

(x) *Savile v. Roberts*, 1 Ld. Raym. 877.

(y) *Michell v. Williams*, 11 M. & W. 213.

(z) *Weston v. Beeman*, 27 Law, J., Exch. 57.

(a) *Stockley v. Hornidge*, 8 C. & P. 16.

(b) *Eagar v. Dyott*, 5 C. & P. 4.

(c) *Stevens v. Mid. Rail. Co.* 10 Exch. 352; 23 Law, J., Exch. 328.

party, had a cause of action against the plaintiff for a sum exceeding 20*l.*, and that there was probable cause for believing that the plaintiff was about to quit England; and, by means of such false and malicious representation, caused and procured the judge to make a special order, directing that the plaintiff might be held to bail, and then maliciously, and without any reasonable and probable cause, sued out a writ of *capias*, and caused the plaintiff to be arrested and imprisoned under the said writ (*d*).

Declarations for maliciously arresting the plaintiff on a ca. sa. for more than was due upon the judgment must show that some actual damage has been sustained by the plaintiff from the wrong done. It is not enough to allege that the judgment had been partly satisfied, and that execution was sued out, and the plaintiff arrested and imprisoned for a larger sum than remained due upon the judgment. The declaration usually sets forth the recovery of judgment by the defendant in a certain action, in which the defendant was the plaintiff and the plaintiff was the defendant, the receipt by the defendant of a certain sum in part payment and satisfaction of the judgment, and that the defendant nevertheless wrongfully and maliciously, and without any reasonable or probable cause, sued out and endorsed a writ of *ca. sa.* for the whole of the debt, and delivered the writ so endorsed to the sheriff, and caused the plaintiff to be imprisoned under the said writ to satisfy the defendant the whole of the debt, whereas at the time of the suing out and endorsing the writ a certain specified smaller sum, and no more, was due from the plaintiff upon the judgment; and, that the plaintiff, after he had been taken and imprisoned, and long before his discharge from custody, was able and willing, and offered to pay, and was afterwards discharged from imprisonment on paying, the specified smaller sum and no more, and that the plaintiff, by reason of the premises, was prevented from attending to his business, was injured in his credit, and was put to and incurred divers costs and expenses for his maintenance during the said detention, and in obtaining his discharge (*e*).

Declarations for a malicious prosecution usually set forth that the defendant, at a specified time and place, appeared before one of Her Majesty's justices of the peace then acting in and for a certain specified locality, and falsely and maliciously, and without any reasonable and probable cause, charged the plaintiff with a felony or a misdemeanour, as the case may be, specifying the nature and substance of the charge as laid in the information before the justice, and averring that the defendant thereby caused the justice to grant his warrant for the apprehension of the plaintiff, and bringing him before the justice, or some other justice, to be dealt with

(*d*) *Petrie v. Lamont*, 4 Sc. N. R. 335; 3 M. & Gr. 702. *Daniels v. Fielding*, 16 M. & W. 206. *Ross v. Norman*, 5 Exch. 350.
 (*e*) *Jenings v. Florence*, 2 C. B., N. S.; 467; 26 Law, J., C. P. 277.

according to law; and that the defendant, under and by virtue of the warrant, procured the arrest and imprisonment of the plaintiff for a certain specified period; and then caused him to be conveyed in custody before certain named justices, then acting as justices in and for a certain specified locality; and then maliciously, and without any reasonable and probable cause, persisted in his false charge and complaint, and caused the justices to commit the plaintiff to prison, to take his trial upon the charge at the then next general quarter sessions of the peace, to be holden, &c.; and then procured the plaintiff to be imprisoned upon the charge until he was discharged as thereafter mentioned; and that the defendant, at the general quarter sessions of the peace holden, &c. falsely and maliciously, and without any reasonable and probable cause, caused the plaintiff to be indicted upon the false, malicious, and pretended charge, and that the plaintiff was in due form of law tried upon the indictment; and was acquitted and discharged out of custody; setting forth the nature and extent of the damages that have been sustained by the plaintiff, and the charges and expenses incurred by him in defending himself against the prosecution.

If there be any special damage it should be stated, with such reasonable particularity as to give notice to the defendant of the peculiar nature of the injury (*f*). The declaration must aver the termination of the prosecution, and set forth the means by which it was ended; otherwise the plaintiff might recover in the action, and yet be afterwards convicted on the original prosecution (*g*).

Of the plea of NOT GUILTY in actions for a malicious arrest and malicious prosecution.—The plea of not guilty in actions for a malicious arrest, malicious prosecution, and maliciously suing out a fiat in bankruptcy, puts in issue the fact of the arrest or the prosecution by or through the instrumentality of the defendant, the question of malice, and of the existence of reasonable and probable cause (*h*) for the prosecution, but not the fact of the discontinuance or termination of the proceedings. If, therefore, the declaration avers the discontinuance of the prosecution, or the termination of the proceedings by a dismissal of the complaint, charge, or petition, these material allegations must be specially traversed, in order to put the plaintiff upon proof of them (*i*).

Plea of justification.—If the defendant, instead of relying on the plea of not guilty, elects to bring the facts before the court in a plea of justification, he must allege as a ground of defence that the facts and circumstances which he relies upon as showing reasonable and probable cause for

(*f*) Post, ch. 21, s. 1.

(*g*) *Fisher v. Bristol*, 1 Doug. 215.
Arundell v. Tregon, Yelv. 116.

(*h*) *Cotton v. Browne*, 3 Ad. & E. 312.

(*i*) *Watkins v. Lee*, 5 M. & W. 270.
Atkinson v. Raleigh, 3 Q. B. 85. *Had-
 drick v. Heslop*, 12 ib. 275.

the institution of the prosecution, were known to him at the time the charge was made, and formed the reason and inducement for his putting the law in motion (*k*).

Evidence at the trial—Proof on the part of the plaintiff—Malicious arrest.—In order to maintain an action against a defendant for a malicious arrest under a judge's order, the plaintiff must, under the plea of not guilty, prove, as we have seen, that the defendant procured the order by imposing upon the judge some false statement, or swearing to his belief in a particular state of facts, without having any reasonable or probable cause for his belief (ante, pp. 434, 435). The plaintiff, therefore, must be prepared to prove the affidavit made by the defendant before the judge by production of the original or an examined or office copy (*l*), and must show that the defendant made the affidavit, or used it (*m*). The judge's order for holding the plaintiff to bail should be proved by production of the original order, purporting to be signed by one of the judges of the superior courts (*n*). The arrest of the plaintiff by virtue of the order, at the instance of the defendant, or by his procurement, may be established by the defendant's declarations and conduct in the matter of the arrest, and the surrounding circumstances of the case, as well as by production of the writ and warrant.

Where the plaintiff put in evidence the judge's order, and a writ of capias which had been issued thereon and lodged with the sheriff, but the capias was not shown to have been returned, neither was any warrant produced, but it was proved that on the defendant being told that the plaintiff was in custody he said, as he had got him fast he would punish him, and further, that his attorney attended before the judge to oppose the plaintiff's discharge, it was held that there was sufficient proof against the defendant, without the production and proof of any warrant (*o*). If the plaintiff has not by his conduct and declarations admitted that the arrest was made by his orders and directions, the writ under which the arrest was effected may be proved by production of the original writ, sealed with the seal of the court; or if it has been returned and become matter of record; it may be proved by a certified or examined copy. The warrant from the sheriff to his officer may be proved in like manner (*p*), and the fact of the arrest may be established by the evidence of the officer who effected it, and by the plaintiff's own testimony in the matter.

(*k*) *Delegat v. Highley*, 5 Sc. 169; 3 Bing. N. C. 960.

(*l*) *Arundell v. White*, 14 East. 224.
Crook v. Dowling, 3 Doug. 75. *Casbarn v. Reid*, 2 Moore, 60.

(*m*) *Rees v. Bowen*, McClel. & Y. 392.

(*n*) 8 & 9 Vict., c. 113, s. 2, post, ch. 20, s. 1.

(*o*) *Petrie v. Lamont*, 3 M. & Gr. 707.

(*p*) Post, ch. 20, s. 1.

An arrest may be established, as we have seen, by proof that the plaintiff voluntarily submitted to the process, or to the commands of the officer, and that restraint was put upon him. It is not necessary to show any actual contact, or that a hand was laid upon him (*ante*, p. 435).

In actions for maliciously arresting the plaintiff on a *ca. sa.* for more than is due, it is not competent for the plaintiff at the trial to obtain a verdict, by proving merely that he was arrested and kept in custody for a greater amount than was due, however improperly indorsed on the warrant; it must be proved, as we have seen (*ante*, pp. 442, 443), that by reason of the arrest and detention for the larger sum, the debtor's imprisonment was prolonged, or the expense of obtaining his discharge increased (*q*).

Proof of malicious informations and complaints before magistrates.—The statute 11 & 12 Vict. c. 42, s. 17, requires all magistrates before whom any person shall appear, or be brought charged with any indictable offence, to take the statement on oath or affirmation of those who know the facts and circumstances of the case, and put the same into writing, and cause them to be read over to, and signed by the witnesses, before they commit the accused person for trial, or admit him to bail. These depositions are afterwards (s. 20) to be delivered to the proper officer of the court in which the person committed or bailed is to be tried, and the latter is (s. 27) to be furnished with a copy thereof on application to the officer or person having the custody of the same.

Where the charge or complaint, or the examination, is by law required to be taken down in writing, it is always to be presumed that this was done, although the party was discharged on the ground that no case was made out against him. Unless, therefore, positive evidence be given that the examinations were not taken down, oral evidence cannot be given of what took place before magistrates (*r*); for where matters are required to be reduced into writing by statute for the purpose of evidence, the writing is considered to be the best evidence, and must be produced, unless it can be shown to have been lost or destroyed (*post*, ch. 20). If it be proved that no depositions were taken, then oral evidence of what took place before magistrates is admissible (*s*).

In order, therefore, to prove the proceedings before magistrates, it is in general necessary to serve the magistrate's clerk with a subpoena duces tecum, if the proceedings are in his custody, but if they have been returned to the clerk of the peace, or his deputy, or to the clerk of the arraigns, then the officer who has the custody of them is the proper person

(*q*) *Jenings v. Florence*, 2 C. B., N. S., 467; 26 Law, J., C. P. 277. *Churchill v. Siggers*, 23 ib. Q. B. 312; 3 Ell. & Bl. 929.

(*r*) *Parsons v. Brown*, 3 C. & K. 206.
(*s*) *Jeans v. Wheedon*, 2 Mood. & Rob. 486.

to be summoned to produce them. If the officer in whose custody they ought to be, if they exist, has searched for them and cannot find them, secondary evidence may be given of their contents (*t*). The oath and handwriting of the defendant should be proved, and the issue of the warrant on the strength of the information.

If the charge was dismissed and was not taken down in writing, or if it was of such a nature, or made under such circumstances, that there was no obligation imposed by law upon the justices to take it down in writing, the nature of it may be proved by any person who was present and heard the charge made (*u*).

In all actions against parties for going before justices of the peace, and lodging a complaint or information against the plaintiff, and obtaining a warrant for his arrest, and causing him to be arrested, it must be proved that the complaint and wrongful acts of the defendant in the matter were done maliciously, and without reasonable and probable cause. If it appears that the defendant laid his case before a magistrate, that the magistrate issued a summons, which was served on the plaintiff, requiring him to appear and answer the complaint, and that the plaintiff chose to take no notice of the summons, whereupon the magistrate directed a warrant to issue, upon which the plaintiff was arrested, the defendant will not be responsible for the arrest, as it was caused by his own negligence and misconduct, rather than by the complaint made against him by the defendant (*x*).

Proof of malicious criminal prosecutions.—To support an action for a malicious and unfounded criminal prosecution, the plaintiff must prove the fact of the prosecution, that it was instigated by the defendant (*ante*, p. 446), or that the defendant was the prosecutor; that the charge was unfounded and made without reasonable and probable cause (*ante*, p. 437); that there was malice on the part of the defendant (*ante*, p. 435); that the prosecution terminated in the plaintiff's favour (*ante*, p. 448); and that injury and expense resulted to the plaintiff from the proceedings. If an indictment preferred by the defendant contains several charges against the plaintiff, and he is convicted on some and acquitted on others, this does not prevent the plaintiff from maintaining an action for a malicious prosecution in respect of the charges of which he was acquitted (*y*). The question whether there was or was not probable cause for some parts of the charge would affect the amount of the damages recoverable, but not the plaintiff's right to a verdict (*z*).

(*t*) *Freeman v. Arkell*, 2 B. & C. 494.

(*u*) *Clarke v. Postan*, 6 C. & P. 423.

(*x*) *Phillips v. Naylor*, 4 H. & N. 615;
27 Law, J., Exch. 224; 28 ib. 225; *ante*,

p. 403; *post*, ch. 13, s. 2.

(*y*) *Reed v. Taylor*, 4 Taunt. 617.

(*z*) *Delisser v. Towne*, 1 Q. B. 348.
Ellis v. Abrahams, 8 Q. B. 713.

Proof by certified copy of the record of the prosecution and acquittal.—The statute 14 & 15 Vict. c. 99, enacts (s. 13), that in order to prove the trial and acquittal of any person charged with any indictable offence, it shall not be necessary to produce the record of the trial and acquittal, or a copy thereof, but it shall be sufficient that it be certified, or purport to be certified, under the hand of the clerk of the court, or other officer having the custody of the records of the court where the acquittal took place, or by the deputy of such clerk or other officer, that the paper produced is a copy of the record of the indictment, trial, and acquittal, omitting the formal parts thereof (a).

It has been declared by Willes, C. J., that "every prisoner upon his acquittal has an undoubted right and title to a copy of the record of such acquittal for any use he may think fit to make of it, and that, after a demand of it has been made, the proper officer may be punished for refusing to make it out (b).

The fact of the defendant's name being on the back of the bill of indictment does not prove that he was the prosecutor of the indictment, for the name of any person who can give evidence respecting the subject matter of the indictment may properly be put upon the back of the bill (c). But the fact of the defendant's having instituted the prosecution may be proved by showing that he employed an attorney or agent to conduct the proceedings, gave orders and directions concerning them, paid expenses, and personally interfered in getting up the case and preparing evidence (ante, pp. 439–446). The mere fact of a party having attended at the trial and given evidence as a witness, is no proof of his having instituted or instigated the prosecution (d).

Having proved that the defendant instigated the prosecution, it must then be shown that it was done maliciously, and without reasonable and probable cause. Proof of express malice is, as we have seen, no proof of want of reasonable and probable cause (ante, p. 435). The plaintiff must give general evidence, showing that there was no reasonable ground for the prosecution (e).

Proof of malice and of want of reasonable and probable cause.—If the circumstances connected with the prosecution are such that the prosecutor must have known that he had no reasonable ground to go upon, there will, as we have seen, be evidence of malice. His own opinion and belief about

(a) Post, ch. 20, s. 1. *Hunter v. French*, Willes, 517. *Caddy v. Barlow*, 1 M. & R. 277.

(b) *Rex v. Brangan*, 1 Leach, C. C. 27. And see the statute, 40 Ed. 3, cited Taylor on Evidence, 1157, n. 4, 2nd edn.

and printed in the appendix to the 9th vol. of the Statutes at Large, p. 45, quarto ed.

(c) *Girlington v. Pitfield*, 1 Ventr. 47.

(d) *Eagar v. Dyott*, 5 C. & P. 5.

(e) *Incedon v. Berry*, 1 Campb. 204 n.

the matter may, as we have seen, be proved by his own statement and admission (ante, pp. 436-438), and conduct in the prosecution. If, with full knowledge of all the facts of the case, he takes no step to put the criminal law in motion until long after the alleged crime or misdemeanour was committed, and then causes the plaintiff to be apprehended and prosecuted, without giving any satisfactory reason for the long delay, it will be a question for the jury whether, when he did at last prosecute, he acted under the *bond fide* belief that the plaintiff was really guilty of the charge he brought against him. If he had no such belief, but acted from vindictive feelings, or from causes foreign to the innocence or guilt of the plaintiff of the offence imputed to him, there will be evidence of malice and of a want of a reasonable and probable cause (ante, p. 437).

Scandalous charges and accusations made by the defendant against the plaintiff in connexion with the prosecution are evidence of malice. Where the defendant put an advertisement in the newspapers of the finding of the indictment by the grand jury, the advertisement was held to be admissible in evidence to prove the malice of the defendant, although an information had been granted for it as a libel, but the jury were directed not to consider it in estimating the damages (f).

The question of probable cause is a mixed proposition of law and fact. Whether the circumstances alleged to show it probable, or not probable, are true and existed, is a matter of fact; but whether, supposing them to be true, they amount to a probable cause, is a question of law for the decision of the judge (g). The *bond fide* belief of the defendant in the truth of the charge preferred by him against the plaintiff, and of the plaintiff's guilt, is essential to the establishment of reasonable and probable cause for a criminal prosecution, and it is for the jury to determine what was the plaintiff's belief in the matter, and whether, if he believed the plaintiff to have done what he imputed to him, he had reasonable grounds for that belief; for if he formed his conclusion rashly and inconsiderately, he is not warranted in acting on his belief (h). If the want of reasonable and probable cause for the prosecution is so strong and plain as to amount to evidence of malice, that must be shown by the plaintiff. An abandonment of the prosecution, or an acquittal for want of evidence, is, as we have seen, no proof of malice, or of the prosecution being unfounded and unjust (i).

Proof on the part of the defendant. — If the plaintiff makes out a *prima*

(f) *Chambers v. Robinson*, 2 Str. 691.

(g) *Johnstone v. Sutton*, 1 T. R. 545.

Panton v. Williams, 2 Q. B. 193. *James v. Phelps*, 11 Ad. & E. 486; Anon. 6. Mod. 73. *Clements v. Ohrlly*, 2 C. & K.

689. *Mitchell v. Jenkins*, 5 B. & Ad. 594.

(h) *Douglas v. Corbett*, 0 Ell. & Bl. 514.

(i) *Purcell v. Macnamara*, 1 Campb. 202; 9 East. 303; ante, p. 435.

facie case of malice, and of want of reasonable and probable cause for the prosecution, the defendant must bring forward circumstances to show that he acted *bonâ fide*, and had reasonable ground for believing that the facts within his knowledge constituted the offence which he charged (*k*). If it should appear from his conduct in the matter that he had no such belief, the plaintiff will, as we have seen, be entitled to a verdict (*ante*, p. 437). In order to show *bona fides* on the part of the defendant, it is competent to him to prove any communication that may have been made to him prior to the commission of the grievance, to show the impression made on his mind, and the materials he had before him for forming an opinion. If the plaintiff had previously been guilty of felony, and the defendant was present at the trial, or had seen a record of the conviction which induced him to act in the matter of the complaint, these facts are receivable as evidence of *bona fides* (*l*).

It is no answer to an action for a malicious prosecution to show that the indictment preferred by the plaintiff was not sustainable, in point of law, against the defendant, "for a bad indictment serves all the purposes of malice, by putting the party to expense and exposing him, but no purpose of justice in bringing the party to punishment if he were guilty" (*m*).

When the plaintiff in his declaration avers that up to the time of the prosecution by the defendant he had borne a good character, and claims damages for injury to his character, it may be shown, on cross-examination of the plaintiff's witnesses, that he was at the time a man of notoriously bad character (*n*). But where the plaintiff does not, in his declaration, expressly claim damages in respect of injury to reputation, general evidence as to the plaintiff's character is inadmissible (*o*). Such evidence affords no proof of probable cause for a prosecution (*p*).

Questions for the jury.—The rule is, that however complicated the facts may be on which the question of reasonable and probable cause may depend, the judge must leave the facts to the jury, and on the facts found by them determine for himself whether there is reasonable or probable cause or not (*q*). "There have been some cases," observes Tindal, C. J., "which appear at first sight to have somewhat relaxed the application of the rule, but there has been no real departure from it. In some cases the reasonableness and probability of the ground for the prosecution has depended, not merely upon the proof of certain facts, but upon the

(*k*) *Weston v. Beeman*, 27 Law, J., Exch. 57. *Turner v. Ambler*, 10 Q. B. 260. *Delegal v. Highley*, 5 Sc. 169.

(*l*) *Thomas v. Russell*, 9 Exch. 704.

(*m*) *Wicks v. Fentham*, 4 T. R. 248. *Pippet v. Hearn*, 1 D. & R. 271.

(*n*) *Rodriguez v. Tadmire*, 2 Esp. 721;

post, ch. 16, s. 3.

(*o*) *Downing v. Butcher*, 2 Mood. & Rob. 374. *Cornwall v. Richardson*, R. & M. 305.

(*p*) *Newsam v. Carr*, 2 Stark. 70.

(*q*) *Douglas v. Corbett*, 6 Ell. & Bl. 515.

question whether other facts which furnished an answer to the prosecution were known to the defendant at the time it was instituted. In other cases the question has turned upon the inquiry, whether the facts stated to the defendant at the time, and which formed the ground of the prosecution, were believed by him or not. In other cases the inquiry has been whether, from the conduct of the defendant himself, the jury will infer that he was conscious he had no reasonable and probable cause. But in these, and many other cases which might be suggested, it is obvious that the knowledge, the belief, and the conduct of the defendant, are so many additional facts for the consideration of the jury, so that in effect nothing is left to the jury but the truth of the facts proved and the justice of the inferences to be drawn from such facts (*r*), the judge determining as matter of law, according as the jury find the facts proved or not proved, and the inferences warranted or not, whether there was reasonable and probable ground for the prosecution, or the reverse."

Of the damages recoverable in actions for a malicious prosecution.—In order to recover damages in an action for a malicious prosecution, the plaintiff must show that he suffered either in person, reputation, or pocket. If, therefore, an indictment is prepared for a common assault, and is ignored by the grand jury, and the party indicted brings his action for a malicious prosecution, he must give some proof of actual damage (*s*), and must show that he was forced to expend his money in necessary charges to acquit himself of the misdemeanour of which he was accused; for if ignoramus be returned where the indictment neither contains matter of scandal nor cause for imprisonment, or loss of life or limb, no action will lie; but if there is scandal, or loss of liberty, &c., an action will lie. "There are," observes Holt, C. J., "three sorts of damages resulting from a malicious and unfounded indictment, any of which would be sufficient to support an action. 1. The damage to a man's fame, as if the matter whereof he is accused be scandalous. 2. Where a man is put in danger to lose his life, limb, or liberty. 3. The damage to a man's property, as where he is forced to expend his money in necessary charges to acquit himself of the crime of which he is accused" (*t*).

If two persons are indicted without reasonable and probable cause for a conspiracy, and one employs an attorney to defend them, and pays him the costs of the defence, and both are acquitted, and an action is brought for a malicious prosecution and a verdict is given for the plaintiff, he is entitled to recover the amount of the attorney's bill as part of the

(*r*) *Panton v. Williams*, 2 Q. B. 194.
Taylor v. Willans, 2 B. & Ad. 856.
Broad v. Ham, 8 Sc. 48.

(*s*) *Freeman v. Arkell*, 3 D. & R. 671.
Byne v. Moore, 5 Taunt. 191.
(*t*) *Savile v. Roberts*, 1 Ld. Raym. 378

damages, unless each had a distinct defence and the cost thereof was severable (u). Every expense that the plaintiff has necessarily incurred in order to defend himself from the false and malicious charge brought against him, is recoverable as part of the damages, if the plaintiff has claimed it in his declaration (x).

Reluctance of the court to interfere with the province of the jury in assessing the damages.— In an action for a malicious prosecution, where the jury gave the plaintiff 10,000*l.* damages, the court refused a new trial, saying they would not interpose on account of the largeness of the damages, unless they were so flagrantly excessive as to afford internal evidence of prejudice and partiality on the part of the jury; that is, unless they were most outrageously disproportionate either to the wrong received or to the situation and circumstances of either the plaintiff or the defendant (y).

(u) *Rowlands v. Samuel*, 11 Q. B. 41.

(x) *Foxall v. Barnett*, ante, p. 431.

(y) *Leith v. Pope*, 2 W. Bl. 1326.

CHAPTER XIII.

OF TRESPASSES AND INJURIES COMMITTED IN THE EXECUTION OF VOID OR IRREGULAR LEGAL PROCESS—RESPONSIBILITY OF JUDGES AND MINISTERIAL OFFICERS OF COURTS OF JUSTICE, AND THE PARTIES SETTING THEM IN MOTION.

SECTION I.—*Of trespasses committed in the execution of void or irregular legal process.*—Of the legal responsibility of judges of superior and inferior courts—Illegal warrants of commitment and distress—Who are judges and judicial officers—Wrongful delegation of judicial functions—Revision of proceedings of inferior courts.

SECTION II.—*Of the duties and responsibilities of ministerial officers of courts of justice, and the parties setting them in motion.*—Illegal assumption of the judicial office—Neglect of ministerial duties—Duties of the sheriff and his officers in the execution of civil process—Priority of writs of execution—Trespasses by sheriffs and their officers—Illegality of an arrest or seizure of goods effected through the medium of an act of trespass—Seizure of the goods of the wrong party—Interpleader between rival claimants—Claims by landlords or sheriffs for arrears of rent—

Sale by sheriffs of goods taken in execution—Wrongful arrests—Countermand of writs and warrants—Escape, recapture, and discharge of prisoners—Arrest and seizure of goods under void or irregular process—False returns to writs—Extortion by sheriffs' officers—Duties and responsibilities of high bailiffs, and bailiffs of the county courts, and of gaolers.

SECTION III.—*Actions against judges, sheriffs, bailiffs, and ministerial officers of courts of justice, and private persons directing or assisting in the execution of civil process.*—Staying proceedings in actions against sheriffs, their officers and assistants—Statutory protection to high bailiffs and persons acting in the execution of county-court warrants—Staying proceedings in actions against high bailiffs, &c.—Parties to actions against sheriffs and ministerial officers—Pleadings, defences, and evidence—Damages recoverable.

SECTION I.

OF TRESPASSES AND INJURIES COMMITTED IN THE EXECUTION OF VOID OR IRREGULAR LEGAL PROCESS—RESPONSIBILITY OF JUDGES AND MINISTERIAL OFFICERS OF COURTS OF JUSTICE, AND THE PARTIES SETTING THEM IN MOTION.

Exemption of judges from actions and suits in respect of things done by them in the exercise of their judicial functions.—The judges in the king's superior courts are not liable to answer personally for their judicial acts.

An action, therefore, will not lie against a judge of a superior court for a wrongful commitment or an erroneous judgment, nor for any act done by him in his judicial capacity (x); nor against a grand jurymen for wrongfully presenting and finding a bill of indictment; nor against a petty jurymen for a wrong verdict; nor against a coroner, who is a judicial officer, for any matter done by him in the exercise of his judicial functions. If, therefore, a coroner thinks that an inquest ought to be conducted in secrecy, he has power to exclude all persons not necessarily engaged in the inquiry; and if the exclusion of any particular person appears to him to be necessary or proper, it is for him to decide who is to be excluded. And if a person has by order of the coroner been forcibly turned out of a room when an inquisition was about to be taken, the party so expelled has no right of action against the coroner for an assault (a).

The general rule as regards judges and judicial officers of courts of superior jurisdiction is, that if they do any act beyond the limit of their authority causing injury to another, they thereby subject themselves to an action for damages; but if the act done be within the limit of their authority, through an erroneous or mistaken judgment, they are not liable to an action (b).

Where parties may not act as judges, but have only a discretion confided to them, an erroneous exercise of that discretion, however plain the miscarriage may be, and however injurious its consequences, will not render them answerable in damages. But where the law neither confers judicial power, nor any discretion at all, but requires certain things to be done, everybody on whom the duty of obedience attaches is bound to do the act required, and is responsible in damages for the consequences of his disobedience or neglect (c).

This freedom from action and suit is given to judges, not so much for their own sake as for the sake of the public and for the advancement of justice, "that, being free from actions, they may be free in thought and independent in judgment, as all who are to administer justice," observes Lord Tenterden, "ought to be."

Exemption of the judges of courts of limited jurisdiction from actions and suits in cases where they had a prima facie jurisdiction, and no objection was taken to their jurisdiction until after they had adjudicated.—A judge of a court of record in England with limited jurisdiction is not responsible in damages for the consequences of his acts and proceedings in respect of

(x) *Hamond v. Howell*, 1 Mod. 184; 2 Mod. 219.

(a) *Garnett v. Ferrand*, 6 B. & C. 611.

(b) *Doswell v. Impey*, 1 B. & C. 160.

Gahan v. Laffitte, 5 Moore, P. P. C. 382.

(c) *Ferguson v. Earl Kinnoull*, 9 Cl. & Fin. 290.

matters over which he had no jurisdiction, if he had a *prima facie* jurisdiction in the matter, and had not the knowledge or means of knowledge, of which he ought to have availed himself, of his want of jurisdiction. Thus it has been held, that if one be arrested by a process out of an inferior court for a cause of action which did not arise within their jurisdiction, the party arrested may well maintain an action against the plaintiff who levied the plaint, and should be intended to know where the cause of action arose; but not against the judge or officer who ~~him~~ entered the plaint, or the officer who had executed it, for when it was impossible for them to know that the cause of action did not arise within their jurisdiction, it would not be agreeable to any rules of justice to make them liable to an action; but the proper and just remedy was against the plaintiff (*d*).

It has accordingly been held, that the judge of a court of record in a borough is not responsible as a trespasser for the imprisonment of a defendant where he had no means of knowing except through the plaintiff or defendant, and did not know, that the cause of action arose without the limits of the borough (*e*).

Where the facts of the case before a county-court judge, although subsequently found to be false, were such as, if true, would have given the judge jurisdiction, the judge was held not to be responsible for his judgment and order in the matter; but where the facts showed that he had no jurisdiction, and the judge mistook the law as applied to those facts, and wrongfully ordered a party to be committed, it was held that he was responsible in damages for the imprisonment (*f*).

If an action is brought in a court of limited jurisdiction, and the defendant pleads to the jurisdiction, the court must decide whether they have jurisdiction or not; and if they decide that they have jurisdiction in a case where they clearly have no pretence for it, and give judgment against the defendant, all the members of the court present, and taking part in the judgment, may render themselves liable to an action (*g*).

A county-court judge is not ousted of his jurisdiction by notice of a *bona fide* claim of title. It is his duty to inquire into the claim, and determine whether there really is a question of title involved in the issue before him. If, in a controversy between landlord and tenant, it appears that the tenant has been actually turned out of possession by a third party, claiming by title paramount, a question of title arises; but this is

(*d*) *Olliet v. Bessey*, 2 W. Jones, 214.

(*e*) *Gwynn v. Poolc*, Lutw. App. 1586.
Calder v. Halket, 3 Moore, P. C. C. 77.

(*f*) *Houlden v. Smith*, 14 Q. B. 852.

(*g*) *Wingate v. Waite*, 6 M. & W. 740.

not the case if it appears that the tenant voluntarily gave up possession to such third party (*h*).

Orders of commitment by county-court judges.—If a county-court judge makes an illegal order of commitment in respect of a matter over which he has jurisdiction, he is not himself responsible for his erroneous judgment (*i*). But if he had no jurisdiction in the matter, and the order or warrant of commitment is put in force, he is liable to an action for false imprisonment, if the facts depriving him of his jurisdiction were brought to his knowledge. The power of the county-court judge to imprison judgment debtors has been considerably curtailed by the stat. 22 & 23 Vict. c. 57.

Commitments for contempt.—A court of record has power to punish, by commitment for contempt, a libel upon the court, published when the court is not sitting as well as when it is sitting, and the question whether the particular publication be libellous or contemptuous is a question for the court which commits. When the commitment is by way of punishment, it ought to be certain as a sentence, and the term of imprisonment should be specified (*k*). The court cannot delegate to a single judge the power of issuing a warrant for the apprehension and committal of the party (*l*). The County Courts Act, 9 & 10 Vict. c. 95, s. 113, gives the judge power to commit for any insults wilfully offered to him or his officers, or for any wilful interruption of the proceedings of the court, or any other misbehaviour in court; and it has been held that the judge has jurisdiction to decide conclusively whether any particular act did amount to an insult, or interruption, or misbehaviour, and that it is unnecessary for the judge to say more in the warrant of commitment than that he had been wilfully insulted (*m*).

Statutory forms of commitment by county-court judges.—The stat. 19 & 20 Vict. c. 108, s. 59, enacts that every warrant of commitment which shall issue from a county court shall, on whatever day it may issue, bear date on the day on which the order for commitment was made, and shall continue in force for one year from such date, and no longer; but no order for commitment shall be drawn up or served; and that any warrant of commitment in respect of an unsatisfied judgment or order of a county court may be in the form, or to the effect, given in the schedule of the act, and that all such warrants shall be deemed sufficient to justify proceedings under them, without any further statement of facts to show jurisdiction.

(A) *Emery v. Barnett*, 4 C. B., N. S., 431; 27 Law J., C. P. 216.

(i) *Hamond v. Howell*, 1 Mod. 184.

(k) *Crawford's case*, 13 Q. B. 629. *Re*

v. James, 5 B. & Ald. 894.

(l) *Van Sandau v. Turner*, 6 Q. B. 785.

(m) *Levy v. Moylan*, 10 C. B. 211.

Who are judges and judicial officers.—The steward of a court-baron is a judicial officer, and cannot, therefore, be made responsible for the mistakes and irregularities of the bailiffs and ministerial officers of the court (n). So also was the sheriff when presiding in the county court as anciently constituted (o).

Commitment by commissioners of bankrupts of a bankrupt, for not fully answering to their satisfaction lawful questions proposed by them to a party whom they have authority to examine, and upon a subject on which they have authority to inquire, are within the limits of their authority, and they are, consequently, not responsible in damages for any such commitment (p). Commissioners of the Court of Bankruptcy have all the powers, rights, and privileges of a court of record, and all other rights, incidents, and privileges, as fully as the same are enjoyed by any of the courts of law or judges at Westminster (q).

Delegation of judicial functions.—Judicial functions cannot be delegated, and if it has been the practice of a particular court to delegate to its clerk the performance of judicial acts, the practice is illegal, and the clerk who thus takes upon himself the office of judge is responsible for the orders he gives. If he takes upon himself to issue a warrant, without the order or direction of the judge, he is liable for the trespasses occasioned by its execution. Where certain commissioners of a court for the recovery of small debts were empowered by statute to order payment of judgment debts by instalments, and, in case of default in payment of the instalments, the commissioners present in court, at the instance of the plaintiff, and upon due proof of the default, were empowered to award execution against the judgment debtor, with such costs as to them should seem just, and it was shown to be the practice of the court for the commissioners, at the time they gave judgment for the plaintiff, to direct the debt to be paid by monthly instalments or execution to issue, it was held that the commissioners had no power to make such a practice or such an order at the time of the judgment, because, if made then prospectively, it dispensed with that proof of non-payment which the statute required, and with the exercise of any discretion on their part as to the execution or further costs; that the direction, therefore, for issuing execution, engrafted on the original judgment, and made part of it, was not merely irregular, but a nullity; that the clerk had issued the warrant without authority, and was consequently liable for the imprisonment occasioned by its execution (r).

Removal of the proceedings of inferior courts for revision by a superior

(n) *Holroyd v. Breare*, 2 B. & Ald. 473.

(o) *Tunno v. Morris*, 2 C. M. & R. 298.

(p) *Doswell v. Impey*, 1 B. & C. 169;
overruling *Miller v. Seare*, 2 W. Bl.

1141.

(q) 12 & 13 Vict. c. 106, s. 6.

(r) *Andrews v. Marria*, 1 Q. B. 3.
Whitelegg v. Richards, 2 B. & C. 45.

tribunal.—The remedy by certiorari is available in all cases to remove the judgments, orders, and proceedings of courts of inferior jurisdiction, for the purpose of being examined by the Court of Queen's Bench, and quashed on the ground of want of jurisdiction or excess of jurisdiction, although the writ of certiorari is expressly taken away by statute. If it distinctly appears from the proceedings of the inferior court that the court has taken upon itself to decide on a matter over which it had no jurisdiction, the statutory prohibition of a certiorari does not apply, and the inherent jurisdiction of the Court of Queen's Bench is not restrained (s). And if there is nothing on the record to show that there was any excess of jurisdiction, the fact may, nevertheless, be established by affidavits (t).

The writ of certiorari, moreover, is not taken away by statutory prohibition, when it is moved for on behalf of the crown. Thus the words in the County Courts Act, 9 & 10 Vict. c. 95, s. 90, enacting "that no plaint entered in any court holden under that act shall be removed or removable from the said court into any of Her Majesty's superior courts of record by any writ or process, unless the debt or damage claimed shall exceed 5*l*," does not take away the prerogative right of the crown to remove into the Court of Exchequer causes affecting the crown revenue. Therefore, where an officer of the crown distrained some of the sheep of the plaintiff, damage feasant in a royal forest, and the plaintiff sought to recover in the county court 1*l*. damages from the officer for an illegal distress, the cause was removed into the superior court, notwithstanding the statutory prohibition (u).

The validity of a commitment by a judge of an inferior court may be tested by habeas corpus (x).

Of proceedings against county-court judges to compel them to act in particular cases.—The stat. 19 & 20 Vict. c. 108, s. 43, enacts that no writ of mandamus shall henceforth issue to a judge or an officer of the county court for refusing to do any act relating to the duties of his office; but any party requiring such act to be done may apply to any superior court or judge thereof, upon an affidavit of the facts, for a rule or summons calling upon such judge or officer, and also the party to be affected by the act, to show cause why such act should not be done; and if after the service of such rule or summons good cause shall not be shown, the superior court or judge thereof may, by rule or order, direct the act to be done, and the judge or officer of the county court, upon being served with such rule or order, shall obey the same, on pain of attachment; and in any

(s) *Reg. v. South Wales Rail. Co.* 13 Q. B. 993.

(t) *Re Penny*, 7 Ell. & Bl. 680; 26 Law, J., Q. B. 225. *Reg. v. Manch. &c.*

Rail. Co. 8 Ad. & E. 417.

(u) *Mountjoy v. Wood*, 1 H. & N. 58.

(x) *Boyce in re*, 22 Law, J., Q. B. 393.

event the superior court, or the judge thereof, may make such order with respect to costs as to such court or judge shall seem fit (y).

SECTION II.

OF THE DUTIES AND RESPONSIBILITIES OF MINISTERIAL OFFICERS OF COURTS OF JUSTICE.

Illegal assumption of the judicial office by ministerial officers.—As judicial functions cannot be delegated (ante, p. 461), it follows that if the mere ministerial officer of the court takes upon himself the responsibility of issuing orders purporting on the face of them to be the orders of the court, but which are issued without its authority, and which are consequently in form only and not in fact the orders of the court, the officer so misconducting himself is responsible for all trespasses that may have been committed in carrying into effect the orders so issued. But if the order has been made in a cause in court over which the court has a general jurisdiction, the mere ministerial officer who receives the warrant or order from the clerk to execute, and has no knowledge that it was issued without the authority of the court, is not responsible for things done under it (z), and the clerk of the court, so long as he confines himself to the mere ministerial duties of his office, and does not take upon himself the exercise of the office of judge, is not responsible for things done under the orders that are signed and issued by him in the discharge of the duties of his office, unless there is a total absence of jurisdiction on the part of the judge (a).

Neglect of duty by ministerial officers of courts of justice.—Every ministerial officer of a court of justice is liable to an action for neglecting the duties of his office. Thus, an action lies against the chief clerk of a court for not entering a judgment on the roll when it is his duty so to do (b). An action also lies against the clerk of the court at the suit of a judgment creditor for unlawfully, without the sanction or authority of the court, taking upon himself to issue an order, purporting to be the order of the court, for the discharge of the judgment debtor, whereby the plaintiff

(y) *Ex parte Fulber*, 27 Law, J., Exch. 453. *Whitehead v. Procter*, 3 H. & N. 583.

(z) *Andrews v. Morda*, 1 Q. B. 3.

(a) *Dews v. Riley*, 11 C. B. 434.

(b) *Douglas v. Yallop*, 2 Burr. 722.

lost the fruits of his judgment. It is no part of the duty of the clerk of the county court to prepare notices of judgments or orders of court for the payment of money, and no action, therefore, lies against him for omitting to prepare such a notice, or for negligently preparing it, whereby a party was misled as to the times of payment of certain instalments ordered by the judge to be paid, and had his goods taken in execution (c).

Duties and responsibilities of the sheriff and his officers—Execution of writs.—It is the duty of the sheriff, as soon as a writ of execution has been lodged in his hands, to make careful and diligent inquiry concerning the execution debtor or his property, and to execute the writ without any unnecessary delay. If he refuses to execute a writ when he has the opportunity, and is required to do it, and nothing occurs to prevent him, he will be responsible in damages to the execution creditor for his negligence (d). On receiving a writ of fi. fa. he must endeavour to ascertain what goods the execution debtor possesses within his bailiwick and seize them, and sell them to the best advantage (e). If he sells goods for much less than they ought to have been sold for, or does not take due and proper care in selling to the best advantage, or if he seizes or sells goods of much greater value than would suffice to satisfy the execution, poundage, and expenses, he will be responsible in damages to the party damnified (f). There is no duty or obligation on the part of the judgment creditor to give the sheriff any information or assistance to enable him to execute the writ (g).

The law has always held the sheriff strictly, and with much jealousy, to the performance of his duty in the execution of writs, both from the danger there is of fraud and collusion with defendants, and also because it is a disgrace to the crown and the administration of justice if the king's writ remain unexecuted, as appears by statute, Westminster 2, c. 39 (h). The law is tender also of the liberties and interests of the subject, and requires the presence of the responsible officer to control the execution of the writ. If, therefore, an arrest is made under a cā. sa. by a bailiff to whom the warrant is not addressed, in the absence of the officer to whom it is addressed, the arrest is irregular, and the defendant will be entitled to be discharged out of custody, and may maintain an action for wrongful imprisonment against the bailiff and the sheriff, unless the court has imposed upon him terms prohibiting him from bringing an action (i). Where a gentleman who had obtained a warrant directed to a sheriff's

(c) *Robinson v. Gell*, 12 C. B. 191.

(d) *Mason v. Paynter*, 1 Q. B. 981.
Brown v. Jarvis, 1 M. & W. 704.

(e) *Pitcher v. King*, 5 Q. B. 767.

(f) *Gawler v. Chaplin*, 2 Exch. 506.
Mullet v. Challis, 16 Q. B. 230.

(g) *Dyke v. Duke*, 4 Bing. N. C. 203.

(h) *Howden v. Standish*, 6 C. B. 520.

(i) *Rhodes v. Hull*, 26 Law, J., Exch.
265. *Gregory v. Colterell*, 5 Ell. & Bl.
571.

officer to arrest his debtor, struck out the officer's name and inserted his own in its stead, and the gentleman was shot by the debtor whilst he was endeavouring to arrest him, it was held to be no murder as the arrest was illegal, not having been effected by the officer named in the warrant (*k*).

Priority of writs of execution.—The sheriff, as between himself and different execution-creditors, is bound to execute that writ which is first delivered to him to be executed, and is responsible to the first creditor who so delivered his writ if he does not, unless the execution of the writ is countermanded; in which case the writ, whilst the countermand continues, must be considered as not delivered at all to be executed, because the sheriff cannot act upon it. If after the sheriff has been desired to suspend the execution of a writ he receives an order to execute it, this order will not relate back, so as to give the execution of the writ any priority over writs which have been placed in the hands of the sheriff during the period of the suspended execution. The countermand of the execution of the writ is equivalent to its withdrawal, and it is not until the sheriff receives notice of withdrawal of the countermand, and an order to proceed, that the writ is considered to have been again delivered to him to be executed (*l*).

Where goods have been seized under a former writ, founded on a judgment fraudulent against a creditor seeking to enforce a subsequent execution, and such goods remain in the hands of the sheriff, or are capable of being seized, the sheriff is bound to seize and sell the goods under a subsequent execution (*m*).

Of the liability of the sheriff for the acts of his officers.—The high-sheriff may be responsible for the acts of the under-sheriff in the execution of the duties of his office, as he is the general officer of the sheriff, but the bailiff is not the general officer of the sheriff. The bailiff gives a bond to the sheriff to execute such warrants as shall be directed to him, and when a warrant is granted him he becomes the special officer of the sheriff for the execution of the particular warrant, and the sheriff is responsible for what he does in the execution thereof, but he is not responsible when the act done by the officer is not done in the execution of a warrant (*n*). The liability of the sheriff in case of mistake or misconduct on the part of his officer, is confined to cases where there is a misdoing of something which the sheriff commands him to do. If the sheriff is sued for a misfeasance of the officer, it is no answer for him to say that his command was not

(*k*) Kenyon, C. J., *Housin v. Barrow*, 6 T. R. 123.

(*l*) *Hunt v. Hooper*, 13 M. & W. 672.

(*m*) *Imray v. Magnay*, 11 M. & W. 275.

(*n*) Littledale, J., *Crowder v. Long*, 4 B. & C. 605. *Drake v. Sykes*, 7 T. R. 116.

obeyed: he is still liable, provided the thing done be something which, by the command, or under the authority of the sheriff, the officer was bound to do (o). If a sheriff acting under a *fi. fa.* issues his warrant to his officer, directing him to levy a certain sum on the goods and chattels of the debtor in the usual form, and the officer arrests the debtor instead of levying on the goods, the sheriff will be responsible in damages for the mistake, although the sheriff never directed or authorized him to make the arrest (p). But if the officer derives his authority for what he does from some third party, and not from the sheriff (q), or if he is not acting in the execution of any process directed to him by the sheriff to be executed, the sheriff is no party to his acts, and is not responsible for what he does.

Thus, if an execution-debtor arrested under a *ca. sa.* pays the debt and costs to the sheriff's officer to obtain his discharge, and the sheriff's officer fails to pay over the money to the execution-creditor, in consequence whereof the debtor is a second time arrested under a fresh writ upon the same judgment, the sheriff is not liable to the debtor for the default of his officer in not paying over the money, as it is no part of the duty of the sheriff or his officer to receive the money. Such a transaction is in the nature of a private arrangement between the debtor and the officer, and the debtor must resort to the officer, who is responsible to him for the non-payment of the money, like any other person who has received a sum of money to be carried to another, and has made default in so doing (r).

Execution of writs by special bailiffs.—And if the sheriff, at the request of the party suing out the writ, or his attorney, appoints a special bailiff for the execution of it, the sheriff is not then liable for the acts of the officer so appointed (s). When, however, the execution of the writ is not expressly taken out of the hands of the sheriff, if there is a mere request that a particular officer may be employed in the execution of it, this does not constitute that officer a special bailiff of the party making the request (t).

Trespasses in dwelling-houses by sheriffs and their officers under colour of the execution of legal process.—If a sheriff, by lifting the latch of the outer door of a dwelling-house, or opening the outer door in the way in which it is ordinarily opened by persons going into the house, enters the house of the execution-debtor himself for the purpose of arresting him, or taking his goods, he is justified, if he has reasonable ground to believe that he is

(o) *Smith v. Pritchard*, 8 C. B. 588.

(p) *Smart v. Hutton*, 8 Ad. & E. 508 n.
Raphael v. Goodman, ib. 565. *Gregory v. Colterrell*, 5 Ell. & Bl. 586; 25 Law, J., Q. B. 38.

(q) *Cook v. Palmer*, 6 B. & C. 742.

(r) *Woods v. Finnis*, 7 Exch. 372.

(s) *Ford v. Leche*, 6 Ad. & E. 706.
Doe v. Trye, 7 Sc. 704; 5 Bing. N. C. 573.

(t) *Alderson v. Davenport*, 13 M. & W. 42.
Corbet v. Brown, 6 Dowl. 794.

there, or that his goods are there; but if he enters the house of a stranger to make the arrest or the seizure, he is justified only in the event of his finding the execution-debtor or his goods in the house (u). If it turn out that the latter is not in the house, or had no property there, the sheriff is a trespasser (x), unless the house was entered in hot pursuit after an escape (post, p. 468). The house in which the execution-debtor resides, i. e. where he sleeps, may be considered to be his own house, although he is not the proprietor thereof, but only a lodger or visitor. "I see no difference," observes Lord Loughborough, "between a house of which the execution-debtor is solely possessed, and a house in which he resides by the consent of another" (y).

Of the breaking open the outer door of a dwelling-house in the execution of legal process.—In Semayne's case (z) it was resolved—"1. That the house of every man is to him as his castle and fortress, as well for his defence against injury and violence as for his repose.

"2. That when any house is recovered by any real action, or by ejectment, the sheriff may break the house, and deliver the seizin or possession to the demandant or plaintiff, for the words of the writ are 'habere facias seisinam,' or 'possessionem;' and, after judgment, it is not the house in right and judgment of law of the tenant or defendant.

"3. That in all cases when the king is party, the sheriff, if the doors be not open, may break the party's house, either to arrest him or to do other execution of the king's process, if otherwise he cannot enter. But before he breaks it he ought to signify the cause of his coming, and to make request to open the doors.

"4. That in all cases when the door is open, the sheriff may enter the house and do execution, at the suit of any subject, either of the body or the goods; but that it is not lawful for the sheriff (after request made to open the door and denial made), at the suit of a common person, to break the defendant's house, if the door be not opened, to execute any process at the suit of any subject.

"5. That the house of any one is not a castle or privilege but for himself, and shall not extend to protect any person who flies to his house, or the goods of any other which are brought and conveyed into his house to prevent a lawful execution, and to escape the ordinary process of law; for the privilege of his house extends only to him and his family, and to his own proper goods, or to those which are lawfully and without fraud and

(u) *Morrish v. Murrey*, 13 M. & W. 57.

(x) *Ratcliffe v. Burton*, 3 B. & P. 220.

Johnson v. Leigh, 6 Taunt. 245.

(y) *Sheers v. Brooks*, 2 H. Bl. 122.

(z) 5 Co. 91.

covin there; and therefore in such cases, after denial on request made, the sheriff may break the house" (a).

The principle that every man's house is his castle does not extend to a barn or outhouse, not connected with a dwelling-house. Therefore the sheriff may break open the door of a barn in order to levy an execution (b).

If the officer, after he has peaceably obtained entrance through the outer door, and before he can make an actual arrest, is forcibly expelled from the house, and the outer door fastened against him, he may then break open the outer door, and make the arrest (c). And when he has once lawfully got inside the house, he is justified in breaking open the outer door to get out again, if the door is locked, and there is no one within who will open the door (d).

If the window of a house be open, or a pane of glass broken, and the bailiff put his hand in and touch one for whom he has a warrant, he is thereby his prisoner, and the bailiff may break open the door of the house to come at him (e), or break through the window (f). And if, after the officer has effected an arrest, the debtor breaks loose and escapes into a house, the sheriff, or his officer, may break the house to retake him, whether the house be the debtor's own house or the house of a stranger, provided he has given notice of the object of his coming, and has demanded and been refused admission (g).

What amounts to a breaking of the outer door.—If the sheriff, or his officer, opens the outer door of a house by lifting a latch, or drawing back a sliding bar, in the ordinary way in which persons going into the house open the door, this is not a breaking of the door. "As to the passage," observes Pollock, C. B., in Comyn's Digest, "EXECUTION," "that the sheriff may not open a latch, there is no reference to any authority in support of it. The cases do not support that proposition" (h).

Of the breaking open of inner doors in the execution of a writ.—If the sheriff, or his officer, gains peaceable entrance at the outer door of a dwelling-house, he may break open an inner door of the house, either to seize the person or the goods of the owner of the house or of a lodger therein (i), and having entered at the open outer door of the house, he need not demand to have the inner doors opened to him before he breaks them, in order to take goods under a fi. fa. (k). Any resistance to the bailiff after

(a) *Semayne's case*, 1 Smith's L. C. 78. 250.

(b) *Penton v. Browne*, 1 Sid. 186.

(c) *Aga Kurboolie Mahomed*, 4 Moore, P. C. C. 239.

(d) *Pugh v. Griffith*, 7 Ad. & E. 827.

(e) *Anon.* 7 Mod. 8. *Sandon v. Jervis*, 6 W. R. 690.

(f) *Lloyd v. Sandilands*, 8 Taunt.

(g) *Anon.* Lofft, 390.

(h) *Ryan v. Shilcock*, 7 Exch. 77; 21 Law, J., Exch. 58.

(i) *Lee v. Gansell*, 1 Cowp. 1; Lofft, 374.

(k) *Hutchison v. Birch*, 4 Taunt. 618. *Lloyd v. Sandilands*, 2 Moore, 210.

he has once entered at the open outer door will be punishable, although the entry may have been obtained by fraud and deceit (*l*).

Illegality of an arrest or seizure of goods effected through the medium of an act of trespass.—If the original entry into a dwelling-house by a sheriff or his officers was unlawful and an act of trespass, their continuance in the house is unlawful, and they cannot avail themselves of an entry or possession unlawfully gained to execute a ca. sa. (*m*). If the sheriff, in making his entry, "has been guilty either of a breach of a positive statute, or of an offence against the common law, such violation of the law in making the entry causes the possession thereby obtained to be illegal (*n*). And if advantage is taken of the unlawful entry to effect an arrest of a judgment-debtor, the court will order the prisoner to be discharged" (*o*).

To break and enter a man's house for the purpose of executing a ca. sa. "is really," observes Parke, B., "not an abuse of the authority of the writ, but it is executing the authority where the sheriff has none; like going out of the jurisdiction to execute the writ. The door being open, is a condition precedent to executing the writ in the dwelling-house" (*p*). As regards the seizure of goods, however, after an unlawful breaking into the house, a different doctrine has prevailed, on the authority of the following case in the Year-book, 18 Edw. 4, 4 a:—"Cateshy comes to the bar, and asks whether a sheriff and his officers breaking into a dwelling-house to execute a fi. fa. do a wrong or not; the judges answer that the defendants may bring trespass against them, notwithstanding the fi. fa., for that will not excuse them for breaking the house, but 'del prisel des biens tantum.'" "This case," observes Coleridge, J., "is cited in *Senayne's case* (*q*), as establishing that if the sheriff breaks the dwelling-house by force of a fi. fa. he is a trespasser by the breaking, and yet the execution which he then doth is good. But it may be doubted whether the judges meant anything more in the Year-book than to state generally what a fi. fa. authorized a sheriff to do; but assuming that they did, still the dictum there, and that in *Senayne's case*, are both purely extra-judicial" (*r*).

When the sheriff becomes a trespasser by remaining on premises an unreasonable time.—The writ of fi. fa. authorizes the sheriff, who has entered upon premises for the purpose of making a levy under it, to remain there for such time as is reasonably necessary for the execution of the writ; but if he remains more than a reasonable time he is a trespasser,

(*l*) *Rex v. Backhouse*, 10ff. 61.

(*m*) *Hooper v. Lane*, 6 H. L. C. 535.

(*n*) *Tindal, C. J., Newton v. Harland*,
1 M. & Gr. 658.

(*o*) *Hodgson v. Towning*, 5 Dowl. 410.

(*p*) *Kerby v. Denby*, 1 M. & W. 341.

(*q*) 5 Co. 92 a, 92 b.

(*r*) *Hooper v. Lane*, 12 H. L. C. 542.

and in the position of a man who has walked into another person's house without any authority. The reasonableness of the time is a question for the jury (s).

Seizure of chattels under a writ of fi. fa.—A sheriff or his officer seizing goods under a writ of execution is responsible in damages if he takes the goods of a wrong party. "If he takes the goods of a stranger, though the plaintiff assures him they are the defendant's goods, he is a trespasser; for he is obliged at his peril to take notice whose the goods are, and for that purpose may impanel a jury to inquire in whom the property in the goods is vested (t), or compel rival claimants to interplead and establish their title" (u). Where, therefore, two persons, being father and son, both had the same name of baptism and surname, and both resided in the same house, and an action was brought against the son, who suffered judgment by default, and a writ of execution was issued against him, under which the sheriff, by mistake, took the goods of the father, it was held that the sheriff was responsible for the consequences of his mistake (x).

The sheriff has no right to seize the goods of a stranger in the possession of the execution-debtor as the ostensible owner (y). If a woman, having furniture of her own, cohabits with the execution-debtor, and assumes his name, and gives herself out as his wife, and permits him to appear to be the owner of her furniture, this does not give the sheriff any right to seize it under the execution against him (z). And if the man and woman have actually gone through the form of marriage, and are supposed to be man and wife, and the goods have been seized and sold by the sheriff, as the goods of the husband, without any notice or objection, and it afterwards transpires that the marriage was void, and that the goods belonged to the supposed wife before the celebration of the void marriage, the sheriff will be responsible to her in damages for the unlawful seizure (a). The acquiescence of the woman was held to be of no moment, the execution being a proceeding in invitum, and she having no power to resist, not having discovered the error.

But where the woman takes an active part in misleading the sheriff, and asserts that she is the wife of the execution-debtor, knowing the assertion to be untrue, she is then herself the cause of the injury of which she complains, and is estopped from disputing the accuracy of her

(s) *Ash v. Dawney*, 8 Exch. 243. *Playfair v. Mugrove*, 14 M. & W. 239.

(t) *Bac. Abr. EXECUTION*, N. 5. *Roberts v. Thomas*, 6 T. R. 88. *Saunderson v. Baker*, 3 Wils. 309.

(u) *Post*, s. 8. INTERPLEADER.

(x) *Jarmain v. Hooper*, 6 M. & Gr. 847; 7 Sc. N. R. 679.

(y) *Dawson v. Wood*, 3 Taunt. 260.

(z) *Edwards v. Bridges*, 2 Stark. 396.

(a) *Glasspoole v. Young*, 9 B. & C. 701.

representation (*b*). And if the evidence shows that she had given the property to the man with whom she cohabited, and had made him the owner of it, the sheriff will then have a right to seize it (*c*).

As one man's goods cannot be seized by the sheriff to pay another man's debts, it follows that the goods of a testator in the hands of an executor cannot be seized under an execution against the executor to satisfy a judgment debt due from the executor himself in his own right (*d*); but if a devastavit has been committed by the executor, and the goods have been converted to his own use, the executor cannot take advantage of his own wrong, and justify his own misconduct, by saying that the goods are not his but his testator's (*e*).

An illegal seizure of goods under void process does not prevent the sheriff from afterwards executing a legal warrant. The subsequent valid seizure is in nowise vitiated by the previous trespass, but a different rule prevails with respect to an illegal arrest (*f*).

When a sheriff has taken possession of goods under a *fi. fa.*, his officer should continue in possession, in order to sustain the seizure against others afterwards coming under legal authority to seize the same goods (*g*).

Seizure by sheriffs and their officers of privileged or protected goods.—An action is not maintainable against a sheriff who has seized privileged or protected goods, in obedience to the commands of a writ, but the party injured must apply to the court for an order upon the sheriff to restore the goods. Thus, if the sheriff seizes the bedding and wearing apparel of an insolvent petitioner, who has obtained an order for protection from process, the remedy is by application to the court for an order upon the sheriff to withdraw, and not by action (*h*).

Of the power of the sheriff to compel rival claimants to goods to interplead and establish their title before he proceeds to make a levy.—By 1 & 2 Wm. 4, c. 58, s. 6, reciting that difficulties arise in the execution of process against goods and chattels issued by authority of the courts, by reason of claims made to such goods and chattels by assignees of bankrupts and other persons not being the parties against whom the process has issued, whereby sheriffs and officers are exposed to actions, it is enacted, that "when any such claim shall be made to any goods or chattels taken, or intended to be taken, in execution under any such process, or to the proceeds or value thereof," it shall be lawful for the court from which

(*b*) *Langford v. Foot*, 2 M. & Sc. 349.

(*c*) *Edwards v. Farebrother*, 2 M. & P. 293. As to seizure of goods let to hire to the execution-debtor, see *Tancred v. Allgood*, 4 H. & N. 444.

(*d*) *Farr v. Newman*, 4 T. R. 621. *Gaskell v. Marshall*, 1 Mood. & Rob. 132.

Fenwick v. Laycock, 2 Q. B. 110.

(*e*) *Quick v. Staines*, 1 B. & P. 205.

(*f*) *Percival v. Stamp*, 9 Exch. 171. *Hooper v. Lane*, 6 H. L. C. 443.

(*g*) *Blades v. Arundel*, 1 M. & S. 711. *Ackland v. Paynter*, 8 Pr. 95.

(*h*) *Rideal v. Fort*, 11 Exch. 847.

such process issued, upon application of the sheriff or officer, made before or after the return of such process, and before or after any action brought, to call before them, by rule of court, as well the party issuing the process as the party making such claim, and thereupon to exercise for the adjustment of such claims, and the relief and protection of the sheriff or officer, any of the powers conferred by the statute, and to make such rules and decisions as shall appear to be just. And the statute 1 & 2 Vict. c. 45, s. 2, enables any single judge of the superior courts to exercise the powers and authorities for the relief and protection of the sheriff or other officer given by virtue of 1 & 2 Wm. 4, c. 58, s. 6.

Among the powers contained in the last-named act is the power of making rules and orders (s. 1), calling upon the claimant to appear and state the nature and particulars of his claim, and maintain or relinquish his claim, and to stay proceedings in actions, and to order actions to be tried, and direct which of the parties are to be plaintiff or defendant in such actions.

It is not necessary that the sheriff should have made an actual seizure of the goods in order to be entitled to the benefit of the statute. It is sufficient if he intends to seize the goods, having the writ or process in his possession (i). The object of the act is to give protection to the sheriff wherever, by reason of claims to the property, he is in danger of actions by the execution-creditor if he yields to the claim, or by the claimant if he executes the writ. But it is not intended to protect the sheriff where the resistance is to the writ itself, *i. e.* where the party in the cause objects to any execution on his own goods, for there the process itself, properly executed, would be the sheriff's defence (k).

The court will not lend its assistance to the sheriff where there have been delays, irregularities, or sinister dealings on the part of his officers charged with the execution of the process. If a sheriff delays to make application for relief at the request, and for the interest of one of the rival claimants, he places himself out of the protection of the statute (l). To enable him to have the benefit of the course opened to him by the statute, it is essential that he should come promptly to the court, without exercising any discretion of his own upon the matters in controversy (m).

There are some old cases in which a great degree of strictness was exercised in admitting the sheriff to the benefit of the act, and in which protection was denied under circumstances in which it would now be conceded (n).

(i) *Lea v. Rossi*, 11 Exch. 13; 24 Law, J., Exch. 280. *Day v. Carr*, 7 Exch. 886.

(k) *Fenwick v. Laycock*, 2 Q. B. 110.

(l) *Mutton v. Young*, 4 C. B. 375.

(m) *Crump v. Day*, *ib.* 764.

(n) *Holt v. Frost*, 7 W. R. Ex. 92.

In an interpleader suit the execution-creditor may claim property which the execution-debtor has disabled himself from claiming for an estoppel, which would be binding against the execution-debtor in a claim put forward by him, will not be binding upon the execution-creditor or the sheriff, who are strangers to the acts of the execution-debtor (*o*).

Of the duty of the sheriff to satisfy the landlord's claim for rent in arrear, before he makes a levy under a fi. fa. — By 8 Anne, c. 14, s. 1, it is enacted, that no goods and chattels upon lands or tenements leased for life or lives, term of years at will, or otherwise, shall be liable to be taken by virtue of any execution, unless the party at whose suit the execution is sued out shall, before the removal of such goods from off the said premises, pay to the landlord or his bailiff all such sums as shall be due for rent at the time of the taking, not exceeding one year's arrears of such rent (*p*). If the rent of the premises on which the levy is to be made is in arrear, there are no goods out of which the sheriff is bound to levy, until the arrear, not exceeding one year's rent, has been paid to the landlord. The sheriff is not called upon by law to advance the money to pay the rent, but such advance must be made by the execution-creditor; and if he neglects to make it after notice of the rent being due, the sheriff cannot be called upon to seize and sell the goods, let their value be what it may (*q*). If a year's rent is in arrear, and the goods on the premises are not sufficient to satisfy a year's rent, the sheriff must withdraw (*r*).

If the landlord or his agent accepts an undertaking from the sheriff or his officer to pay the rent due, and consents to the removal of the goods, he waives the benefit of the statute, and cannot afterwards sue thereon. His remedy in such a case is upon the undertaking (*s*).

A trustee in whom the legal estate in reversion is vested may be the landlord within the meaning of the statute (*t*). To entitle the landlord to the year's rent, there must be an existing tenancy at an ascertained rent at the time (*u*), and the execution must not be an execution put in by, or at the instance of, the landlord himself (*x*). The statute does not extend to a ground-rent due to the superior landlord (*y*), nor to goods seized by the sheriff and conveyed by bill of sale to the execution-creditor, but not removed from the demised premises, the landlord's right to distrain such goods not being taken away (*z*).

(*o*) *Richards v. Johnston*, 4 H. & N. 86.
064.

(*p*) *Foster v. Cookson*, 1 Q. B. 419.

(*q*) *Cocker v. Musgrove*, 9 Q. B. 234.

(*r*) *Foster v. Hillon*, 1 Dowl. 35.

(*s*) *Rothery v. Wood*, 3 Campb. 24.

(*t*) *Colyer v. Speer*, 4 Moore, 473.

(*u*) *Hodgson v. Gascoigne*, 5 B. & Ald.

(*z*) *Taylor v. Lanyon*, 4 M. & P. 316;
6 Bing. 536. *Lee v. Lopes*, 15 East.
230.

(*y*) *Bennet's case*, 2 Str. 780.

(*z*) *Smallman v. Pollard*, 7 Sc. N. R.
911; 6 M. & Gr. 1001. *White v. Bin-
stead*, 13 C. B. 304.

This right of the landlord to a year's rent is confined to executions upon judgments (a) and private extents, and does not extend to prerogative process, such as an extent in chief, or an extent in aid (b). If the execution-debtor holds under a lease in writing, the fact of rent being due must be established by production of the lease (c).

Sale by sheriffs of goods taken in execution.—It is the duty of the sheriff to sell goods seized under a fi. fa. within a reasonable time after the seizure; and if he fails so to do, an action is maintainable against him by the judgment-creditor (d). If he sells more than sufficient to satisfy the judgment debt and costs, he will be responsible in damages to the execution-debtor (e). In selling goods seized under a writ of execution, he can convey no better title to the goods than the execution-debtor himself possessed at the time of the sale, and does not, when he sells, profess to do more than that, and does not warrant the title to the purchaser (f).

If the sheriff has sold goods which were in the possession of the execution-debtor at the time of the sale as the ostensible owner, but which were in reality the goods of a plaintiff, who had let them to hire to such execution-debtor, the sheriff is not liable to an action for the wrongful sale, unless it be proved that some actual damage has accrued therefrom to the plaintiff (g), and that he has been prevented by the act of the sheriff from recovering possession of his goods (g).

Arrest of the wrong person.—If the sheriff's officer has, by mistake or through false information, arrested the wrong party under a ca. sa., the sheriff is responsible for the mistake, unless the plaintiff was himself instrumental in giving false information to the sheriff, or brought about his imprisonment by his own misrepresentation (h).

Arrest of the right person under a wrong name.—If there is no mistake as to the person of the debtor, if his identity is established, but there is a misnomer, either from the debtor's having given himself a wrong name or from his having suffered judgment to be obtained against him in the wrong name he will be deemed to be known as well by his assumed name as by his real name, and he will have no ground to object to the proceedings against him (i). If he has been sued by a wrong name, and suffers judgment to go against him without attempting to rectify the mistake, he cannot afterwards, when execution has been issued against him in the wrong

(a) *Brandling v. Barrington*, 9 D. & R. 617.

(b) *Rex v. Southey*, Bunb. 5.

(c) *Augustine v. Challis*, 1 Exch. 379; post, Ch. 20.

(d) *Jacobs v. Humphrey*, 2 Cr. & M. 413.

(e) *Bates v. Wingfield*, 2 N. & M. 831.

(f) *Batchelor v. Vyse*, 4 M. & Sc. 552.

(f) *Chapman v. Speller*, 14 Q. B. 621.

(g) *Tancred v. Allgood*, 4 H. & N. 444; 2^d Law, J., Exch. 362.

(h) Ante, p. 479. *Dunstan v. Paterson*, 2 C. B., N. S., 495; 26 Law, J., C. P. 268.

(i) *Price v. Harwood*, 3 Campb. 108. *Walker v. Willoughby*, 6 Taunt. 630.

name, contend that he is not the person whom the sheriff or his officer is directed to arrest (*k*). Whenever a defendant omits to plead a misnomer, he may be taken in execution in the wrong name (*l*).

Illegal arrest on Sundays.—The 29 Car. 2, c. 7, s. 6, prohibits the service or execution on Sunday of any writ, process, warrant, order, judgment, or decree, except in cases of treason, felony, and breach of the peace (*m*), and the stat. 9 Geo. 4, c. 31, s. 23, makes it a misdemeanour to arrest any clergyman upon any civil process while he is performing divine service (*n*).

Incurability of a wrongful imprisonment.—Arrest under one of several writs.—Where an arrest has been made on a valid writ, the sheriff may detain the party arrested on any number of valid writs which he has at the time against such party, or which afterwards reach him; but if the sheriff makes the arrest on a forged or feigned writ, or a writ which has never been sealed or stamped, and is therefore invalid, this gives him no right to detain the party on any other valid writs which may be at that time in his hands, for the sheriff cannot avail himself of a custody brought about by illegal means to execute the other writs; and if the sheriff knew, or ought to have known, that the writ under which he arrests was void, and nevertheless makes the arrest, and so deprives himself of the power of executing other valid writs in his hands, he will be responsible for culpable negligence and breach of duty. If an arrest be made on a Sunday, or in a way not authorized by law, the sheriff cannot afterwards make that valid by detaining the party under a legal writ, but must first give him an opportunity of going at large, and then execute the legal writ. But that is not the case with regard to an execution against the goods (*o*). If, therefore, a first arrest be a false imprisonment by the wrongful act of the sheriff himself or his officer, no subsequent conduct or act of his can legalize the continuance by him of that imprisonment (*p*).

Arrest of privileged persons by sheriffs and their officers.—In all cases of privilege, whether on the ground of the person being a member of the legislature, or having a duty to perform about the person of the Queen, or from any other cause, it has always been considered that the sheriff is justified if he obeys the Queen's writ, and that the privileged party must apply to the court for his discharge (*q*). The arrest by the sheriff, under

(*k*) *Fisher v. Magnay*, 6 Sc. N. R. 599; 5 M. & Gr. 779.

(*l*) *Crawford v. Satchwell*, 2 Str. 1218.

(*m*) *Wells v. Gurney*, 8 B. & C. 769.

(*n*) *Goddard v. Harris*, 5 M. & P. 122; 7 Bing. 320.

(*o*) *Eggington's case*, 2 Ell. & Bl. 728.

Percival v. Stamp, 9 Exch. 171. *Hooper v. Lane*, 27 Law, J., Q. B. 76; 6 H. L. C. 497.

(*p*) *Humphrey v. Mitchell*, 3 Sc. 51.

(*q*) *Alderson, B., Rideal v. Fort*, 11 Exch. 852.

a writ from any of the Queen's courts of a person privileged from arrest, by reason of his being in attendance as a witness under the process of another court, does not form the ground of any action at law, but is only the subject of an application to the court under whose authority the party has been compelled to appear as a witness, to discharge him from custody (*r*). If a party who has obtained an order of protection from the Insolvent Court is, nevertheless, arrested under a *ca. sa.*, he is entitled to be discharged, and thus obtains the benefit of his protection, but he has no claim for damages (*s*).

Notice to the sheriff or his officer not to execute a ca. sa. will render both the bailiff and the sheriff responsible for a false imprisonment if the arrest is made after the receipt of the notice, provided the notice has been given by the plaintiff's attorney. If the officer receives notice from the attorney that the action is settled, or that the execution is withdrawn, that is a notice not to make the arrest (*t*). If a writ is left at the sheriff's office, with orders not to execute it, and the sheriff arrests under it, he is a wrongdoer: if it is to be returned *non est inventus*, it must lie; and the sheriff ought not to issue a warrant or arrest; but if the defendant is brought in, or chooses to come in and surrender, then the sheriff must arrest (*u*).

Under a writ of *fi. fa.*, which directs the sheriff to make a certain specified sum out of the goods and chattels of the defendant, and have the money at the return of the writ, the sheriff or his officer may receive the money in discharge of the execution, and withdraw the levy and liberate the defendant's goods on payment of the money; but under the writ of *ca. sa.*, which commands the sheriff to have the body of the debtor at the return of the writ to satisfy the plaintiff, and not the money to pay the debt, the sheriff has no right to receive the money and discharge the debtor, and substitute his own responsibility for that of the debtor, whose body the creditor has a right by law to keep until he has been paid the debt. If, therefore, a sheriff's officer, charged with the execution of a writ of *ca. sa.*, allows the debtor, whom he has arrested under it, to go at large on paying to him the sum mentioned in the writ, the sheriff will be responsible for an escape, for it is a neglect of duty on the part of the officer for which the sheriff is answerable (*x*).

Liability of the sheriff for an escape.—If a defendant, after having been taken in execution, is seen at large for ever so short a time, either before or after the return of the writ, under which he has been arrested, the

(*r*) *Magnay v. Burt*, 5 Q. B. 395.

(*s*) *Yearley v. Heane*, 14 M. & W. 334.

(*t*) *Fulcher v. Hinder*, 28 Law. J., Exch. 28. *Wubbers v. Parker*, 4 H. & N.

524.

(*u*) *Hooper v. Lane*, 6 H. L. C. 522.

Magnay v. Mosger, 4 Q. B. 817.

(*x*) *Woods v. Finnis*, 7 Exch. 372.

sheriff is responsible for an escape, as the writ commands him to take the defendant, and him safely keep, so that he may have him ready to satisfy the plaintiff (y). It is the duty of the sheriff to carry his prisoner to the county gaol after he has been arrested under a ca. sa., and when once in gaol, the debtor must be kept there, and cannot be allowed to go out, though with a keeper or sheriff's officer. If, therefore, he is seen without the walls of the prison, the sheriff is responsible for an escape (z). If the sheriff, after he has arrested the debtor, receives from the latter the amount of the debt and costs, he will be responsible to the judgment-creditor for an escape, if he sets his prisoner at large contrary to the exigency of the writ, before the judgment-creditor has been satisfied his demand; for the duty of the sheriff is to pursue the direction of the writ, and be ready at the day, not with the money, but with the body of the debtor, unless the party himself who sued out the writ interfere and agree to the liberation of the prisoner upon receipt of the money which has been paid to the sheriff (a).

It is the duty of an officer going to make an arrest in the execution of legal process to choose his opportunity, and to go with a force sufficient to repel opposition, and enable him to execute the process intrusted to him. If he fails to make an arrest, or if, having got the debtor into his custody, he fails to keep him for want of sufficient force, he will be responsible for a breach of duty (b). But if the prison take fire, or be broken open by the king's enemies of another kingdom, and the prisoner escapes, this will excuse the sheriff; but it is otherwise if the prison be broken open by traitors and rebels (c). And if the escape has been brought about by misrepresentation or misconduct on the part of the plaintiff, the latter has no cause of complaint against the sheriff (d).

By 8 & 9 Wm. 3, c. 27, s. 8, it is enacted, that if the keeper of any prison shall, after one day's notice in writing, given for that purpose, refuse to show any prisoner committed in execution to the creditor, at whose suit he was committed, or to his attorney, every such refusal shall be adjudged an escape in law.

Recapture upon fresh pursuit.—The sheriff may retake the debtor upon fresh pursuit in any county without an escape warrant, and plead the recapture in bar of an action for damages.

Discharge of debtors taken in execution.—By 15 & 16 Vict. c. 76, s. 126, it is enacted, as we have seen, that a written order, under the hand of the

(y) *Hawkins v. Plumer*, 2 W. Bl. 1048.
Moore v. Moore, 27 Law, J., Ch. 387.
 (z) *Williams v. Mostyn*, 4 M. & W.
 152.
 (a) *Slackford v. Austen*, 14 East. 473.

Woods v. Finnis, 7 Exch. 372.
 (b) *Nicholl v. Darley*, 2 Y. & J. 403.
 (c) *Southcot's case*, 4 Co. 84 a.
 (d) *Hiscocks v. Jones*, 1 M. & M. 209;
 ante, p. 479.

attorney in the cause, by whom any writ of ca. sa. has been issued shall justify the sheriff, or person in whose custody the party may be under such writ, in discharging such party, unless the party for whom such attorney professes to act shall have given written notice to the contrary. The sheriff is not bound to discharge a debtor from his custody immediately on receiving an order for his discharge. He is entitled to a reasonable time to search his office, to ascertain whether there are any other writs lodged against him (e).

Arrest of the person and seizure of goods under void or irregular process.

—In depriving a man of his liberty and seizing of his goods, the sheriff and his officers act at their peril, so that if the process is feigned, forged, or simulated, and is not the process or order of the court, it is a mere nullity, and the sheriff can derive no protection from the piece of waste-paper (f). But if the sheriff has acted under a genuine writ, issued from one of the superior courts, he and his officers acting under him are protected by it, although it be on the face of it irregular, as a *capias* against a peeress (g); or void in form, as a ca. sa. not made properly returnable, for the officers ought not to examine the judicial act of the court, nor exercise their judgment touching the validity of the process in point of law, but are bound to execute it, and are therefore protected by it (g). But the parties who have issued the void or irregular process are, as we have seen, responsible for all damage and injury done in the execution of it after the process has been set aside by the court or a judge, unless it has been set aside on the terms that no action shall be brought (h). And if a writ of ca. sa. has been issued upon a judgment for less than 20*l.* in an action, for a debt, the party arrested under the writ may maintain an action both against the attorney who sued out the writ and the client who set the attorney in motion, for damages for the wrongful imprisonment, although the writ has not been set aside, for the statute expressly declares that no person shall be taken in execution upon such a judgment.

Generally speaking, however, so long as the process has not been set aside, it is a protection to the attorney who has issued it, and to the client by whose commands it was issued (i); and though when it has been set aside it is no longer a justification to them, yet it always remains a justification to the sheriff and his officers, who had no option but to obey it (k).

A writ of execution therefore may, at the same time, be both a good

(e) *Samuel v. Buller*, 1 Exch. 440.

(f) *Hooper v. Lane*, 10 Q. B. 581; 6 H. L. C. 443.

(g) *Countess of Rutland's case*, 6 Rep. 54 a. *Cotes v. Michill*, 3 Lev. 20.

(h) *Parsons v. Lloyd*, 3 Wils. 341.

(i) *Riddell v. Pakeman*, 2 C. M. & R. 33. *Blanchenay v. Burton*, 4 Q. B. 707.

(k) *Jones v. Williams*, 8 M. & W. 356; Best, J., 5 B. & Ald. 746. *Turner v. Felgate*, 1 Lev. 95.

writ and a bad writ; that is to say, a writ set aside for irregularity may be good as to the sheriff and all persons acting under him, and bad as to the persons who sued it out (*l*).

If the sheriff, by force of a *fieri facias*, sell goods, and afterwards the judgment is reversed by writ of error, the defendant shall not have restitution of his goods, but the value of them, for which they were sold; and there are two reasons for this:—1. If the sale of the sheriff, by force of a *fieri facias*, should be avoided by subsequent reversal of the judgment, there would be no buyer, and by consequence no execution done. 2. In the case of a *fieri facias*, the sheriff is compellable to make and levy the debt of the goods, &c. of the defendant, and therefore there is reason that it should stand (*m*).

Exemption of sheriffs and officers from responsibility when the injury of which the plaintiff complains has been brought about by his own misstatements and misrepresentations.—Every person who, by misrepresentation or misstatement, causes an officer charged with the execution of legal process to make a mistake and arrest the wrong party, or seize his goods, cannot complain of the wrong which he has himself occasioned. If by misrepresentation he causes himself to be arrested, he is the author of his own misfortune, and has no right to charge it upon the officer (*n*). If the plaintiff has represented himself to be the person against whom the process has been issued, and is arrested in consequence of that representation, he is estopped, as we have seen (*ante*, p. 403), as regards that imprisonment, from denying that he was the right person; but, after he has given notice of the real state of facts to the officers, and given them a fair opportunity of inquiry, the detention would be unlawful (*o*).

False returns to writs of execution.—If the sheriff makes a false return to a writ of execution, he is responsible in damages to the execution-creditor if any actual damage has resulted to him from the false return (*p*). A return of *nulla bona* to a writ of *fi. fa.* means, that there are no goods applicable to the execution of the plaintiff's writ, not that there are no goods at all belonging to the execution-debtor. If, therefore, the payment of prior claims, such as rent due to the landlord, or sums leivable under prior writs of execution, has exhausted the fruits of the levy, the sheriff has no goods out of which the damages can be levied, and a return of *nulla bona* is a good return (*q*). If the sheriff returns that he has seized certain

(*l*) Parke, B., 9 Dowl. 710. *Doe v.*

Thorn, 1 M. & S. 427.

(*m*) *Hoe's case*, 5 Co. 90b.

(*n*) *Fisher v. Magway*, 5 M. & Gr. 778.

(*o*) *Dunston v. Paterson*, 2 C. B., N. S.,

405; 26 Law, J., C. P. 268.

(*p*) *Wylie v. Birch*, 4 Q. B. 566.

(*q*) *Shattock v. Carden*, 6 Exch. 725

Windle v. Freeman, 11 Ad. & E. 547

Heenan v. Evans, 4 Sc. N. lt. 2.

goods and chattels, he ought to specify their value, and not return that their value is to him unknown (*r*). A reasonable degree of certainty in the language of the return is sufficient.

The sheriff is not allowed to put a construction on his own return which would make it bad, when it admits of another construction which will make it good (*s*).

Extortion by sheriffs and their officers.—By 29 Eliz. c. 4, s. 1, it is enacted, that it shall not be lawful for any sheriff, under-sheriff, bailiff, &c., nor for any of their officers, deputies, &c., by reason or colour of their offices, to receive or take for the serving or executing any extent or execution, more consideration or recompense than is by that act limited and appointed, upon pain that every sheriff, under-sheriff, &c., their officers, &c., who shall directly or indirectly do the contrary, shall forfeit to the party grieved treble damages, and pay a penalty as therein mentioned, but the act is not to extend to fees taken for executions within any city or town corporate. The stat. 7 Wm. 4, and 1 Vict. c. 55, further enacts that it shall be lawful for sheriffs and their officers to receive such fees, and no more, as shall be allowed by the taxing officers of the courts of Westminster, under the sanction of the judges, and that any sheriff or officer receiving any fee or gratuity greater than is allowed, shall be guilty of a contempt of court, and punishable accordingly. And by 5 & 6 Vict. c. 98, s. 31, it is enacted, that no poundage shall be payable to sheriffs, bailiffs, and others, for taking the body of any person in execution (*t*); but there shall be payable to the sheriff, or other person having the return of writs, upon every such execution against the body, such fees only as shall be allowed to be taken under 7 Wm. 4 and 1 Vict. c. 55. The sheriff still continues entitled to his poundage under the statute of Elizabeth, on an execution against the goods of the debtor, and also to any additional fee that may be allowed by the judges under 7 Wm. 4 and 1 Vict., and to no more. If his officer takes more the sheriff is guilty of extortion, and is liable to an action for treble damages (*u*).

Duties and responsibilities of the high-bailiff and bailiffs of the County Court.—By 9 & 10 Vict. c. 95, s. 83, the high-bailiff of the county court is made responsible for all the acts and defaults of himself and the bailiffs appointed to assist him, in like manner as the sheriff of any county in England is responsible for the acts and defaults of himself and his officers. His liability is co-extensive with that of the sheriff, but he is not respon-

(*r*) *Barton v. Gill*, 12 M. & W. 315.

(*s*) *Reynolds v. Barford*, 8 Sc. N. R. 230.

(*t*) *Hayley v. Racket*, 5 M. & W. 620.

(*u*) *Wrightup v. Greenacre*, 10 Q. B.

12. *Pilkington v. Coker*, 16 M. & W.

613. *Woodgate v. Knatchbull*, 2 T. R.

155.

sible for things done by his bailiffs under colour of some special power or authority supposed to be given to them under the County Courts' Act, and not done under the authority or in execution of a warrant (x).

Of the liability of ministerial officers of courts of inferior jurisdiction where the court had no jurisdiction in the matter, and no authority to issue the process under which the officer has acted, and under which he seeks protection.—At the common law a grievous responsibility was thrown upon ministerial officers of courts of inferior and limited jurisdiction, where the court had made orders and directed the issue of process, without jurisdiction in the matter, or where it had exceeded its jurisdiction. It was held, that when the court had not jurisdiction of the cause, then the whole proceeding being coram non iudice, actions would lie against the party who sued out and against the officer or minister of the court who executed the precept or process of the court, without any regard to such precept or process; "for the officer is not bound to obey him who is not judge of the cause any more than he is bound to obey the mere precept or order of a stranger, for the rule is, *judicium a non suo iudice datum nullius est momenti*" (y). Therefore, where an officer acting under a warrant of a commissioner of bankrupts took and detained a party in custody under it, and it appeared that the commissioner had no jurisdiction to make the warrant, it was held that an action of trespass was maintainable against the officer (z). But the mischiefs arising from this unreasonable state of the law have to a great extent been remedied by the legislature (a).

Of the duty of bailiffs of the County Court to satisfy the landlord's claim for rent.—By 19 & 20 Vict. c. 108, s. 75, it is enacted, that the stat. 8 Anne, c. 14 (ante, p. 473), shall not apply to goods taken in execution under the warrant of a county court; but the landlord may, within five days of the taking, or before the removal of the goods, make a claim in writing for rent, signed by himself or his agent, stating the amount of the rent in arrear, and the time for which it is due, and if such claim be made the officer making the levy is to distrain for the rent so claimed, and the costs of the distress, but he is not to sell within five days, unless the goods be of a perishable nature, or upon the request in writing of the party whose goods have been taken. After the five days the bailiff is to sell such of the goods as will satisfy, first the costs of the sale, next the claim of the landlord, not exceeding the rent of four weeks where the tenement is let by the week, the rent of two terms of payment where the tenement is let for any other term less than a year, and the rent of one year in any other case, and lastly, the amount for which the warrant

(x) *Smith v. Pritchard*, 8 C. B. 588.
(y) *The Marshalsea case*, 10 Co. 76 a.

(z) *Watson v. Bodell*, 14 M. & W. 57.
(a) *Post*, pp. 485-487, and ch. 14.

issued. If any replevin be made, the bailiff is notwithstanding to sell such portion of the things taken as will satisfy the costs of the sale under the execution, and the amount for which the warrant issued. Any over-plus of the sale or residue of the goods is to be returned to the defendant.

Things not distrainable by county-court bailiffs in satisfaction of rent.—The county-court bailiff cannot, under this statute,^{*} distrain the goods of a stranger on the demised premises for the purpose of satisfying the landlord's rent (*b*).

Liabilities of gaolers.—A gaoler who receives a prisoner under a warrant is not responsible in damages if the warrant has been irregularly issued; but if the wrong man has been arrested and brought to him, or the warrant is altogether void and a mere nullity, he will be responsible for the detention. Where the plaintiff had been delivered into the custody of the gaoler of a liberty under a good warrant for arrest, though the execution of it was illegal, inasmuch as the plaintiff, under a warrant to the bailiff of the liberty, had been arrested without the liberty, and afterwards carried into the liberty and delivered to the gaoler, it was held that an action could not be maintained against the gaoler, who was not bound to inquire whether the original arrest was tortious or not. "And it was said by the court, that if he had been informed of the tortious taking (without being of the covin or practising therein), he ought, nevertheless, to detain the prisoner, being delivered to him with a good warrant of arrest, though the execution of it was illegal; for if such information had been false, and the gaoler had set the prisoner at large, he had been liable for an escape. And the plaintiff was not without remedy, for he had a good action against wrongdoers (*c*). But if a sheriff's officer arrests the wrong man, and hands him over to a gaoler, there as the arrest is altogether unjustifiable, and the warrant no protection, the gaoler who receives and detains the wrong man is responsible for the wrongful imprisonment, and cannot justify under the warrant, though he had no means of ascertaining the identity of the party brought to him with the person named in the warrant, and could not, consistently with his duty, have refused to receive and detain him (*d*). But if the party thus wrongfully arrested does not, when brought to the gaoler, complain of the wrongful arrest, or give the gaoler any means of ascertaining that he is not the person named in the warrant, nominal damages only would be recoverable.

(*b*) *Beard v. Knight*, 8 Ell. & Bl. 865; 27 Law, J., Q. B. 350. *Foulger v. Taylor*, 8 W. R. 270.

(*c*) *Ollivet v. Bressy*, 2 Jones, 214.

(*d*) *Aaron v. Alexander*, 3 Campb. 84. *Griffin v. Coleman*, 4 H. & N. 265; 28 Law, J., Exch. 134; Bro. Abr. TRESPASS, pl. 133, 256, 265.

SECTION III.

OF ACTIONS AGAINST JUDGES, SHERIFFS, AND MINISTERIAL OFFICERS OF COURTS
OF JUSTICE AND THEIR ASSISTANTS, AND THE PARTIES SETTING THEM IN
MOTION.

Actions against county-court judges—Notice of action.—Provision is made by the County Courts' Act (19 & 20 Vict. c. 108, s. 19) for the prosecution of actions in the county court against judges of the county court in the court of a district adjoining the district in which the defendant is judge. By 9 & 10 Vict. c. 95, s. 138, notice of action is required, as we have seen, to be given to all persons acting in execution of the County Courts' Act. If, therefore, a county-court judge, in making an order of commitment, acts under the *bonâ fide* belief that his duty as judge of the county court renders it incumbent on him to do so, notwithstanding a prohibition has been issued, the act done by him must be considered as done in pursuance of the County Courts' Act, and he is entitled to notice of action (e).

All judges of courts of inferior jurisdiction acting under the authority of an act of parliament, are in general entitled to notice of action, and to an opportunity of tendering amends and paying money into court, and the action against them must in general be brought within a certain limited period.

Actions against a sheriff and his officers for a wrongful arrest under colour of legal process.—An action for false imprisonment may be maintained by a person arrested under a ca. sa. upon a judgment for less than 20*l.* in an action for a debt, although the writ has never been set aside; for where an act of parliament says that no person shall be taken in execution upon such a judgment, he who does what the act forbids is responsible for an assault and false imprisonment. The sheriff could justify under the writ, but not the party who sues out and sets in motion the forbidden process (f). Generally speaking, however, the process must, as we have seen, be set aside before an action can be maintained for anything done under it (ante, p. 478).

Actions against sheriffs and officers for an escape.—Formerly the statutes 13 Edw. 1, c. 11, and 1 Ric. 2, c. 12, gave the party who suffered by an escape of his debtor the same remedy against a sheriff or gaoler guilty of the escape that he had against the debtor, and enabled him to recover

(e) *Booth v. Clive*, 10 C. B. 835; ante, pp. 411–415.

(f) *Brooks v. Hodgkinson*, 4 H. & N. 712.

from such sheriff or gaoler the whole debt and costs in an action of debt; but it has recently been enacted by 5 & 6 Vict. c. 98, s. 31, that if any debtor in execution shall escape out of legal custody, the sheriff, bailiff, or other person having the custody of such debtor, shall be liable only to an action upon the case for damages sustained by the person at whose suit such debtor was imprisoned, and shall not be liable to any action of debt in consequence of such escape.

Actions to recover money in the hands of the sheriff.—After a return to a *fi. fa.* that the money is levied, the sheriff may be liable to an action for money had and received without any demand of payment (g).

Of staying proceedings in actions against sheriffs, their officers and assistants.—We have already seen, that where an action has been brought against a sheriff or his officers for wrongfully seizing or converting the goods of the plaintiff in the execution of process issued by the authority of the courts, it is competent for the court from which the process issued to call before them, by rule of court, the party issuing the process, and the person bringing the action, and compel the latter to state the nature and particulars of his claim to the goods seized by the sheriff, and to order proceedings for deciding upon the validity of the claim, and in the meantime to stay proceedings in the action against the sheriff (*ante*, pp. 471–473). This statute refers, as we have seen, to the execution of process against goods and chattels, and is intended to protect the sheriff against vexatious actions by parties against whom the process is not directed, but who claim to be the owners of the goods seized under it by the sheriff. If, therefore, there has been an unlawful breaking open of the outer door of a dwelling-house by the sheriff, in order to effect the seizure of the chattels, this is a wrong quite independent of any question of ownership of the goods seized, and the court or a judge has no authority to stay proceedings in an action brought in respect thereof. The statute is altogether silent respecting such a subject-matter of complaint, and therefore affords the sheriff no protection in respect of it. “It is quite clear,” observes Maule, J., “that an action for unlawfully breaking and entering a house in the execution of process is no more within the contemplation of this act than an assault and battery of the party would be. It cannot be said that the damages in such an action are something as to which the sheriff doubts who is entitled to them. He is charged as a wrongdoer; there is nothing to interplead about; nobody but himself is interested in the result, or liable for the consequences” (h).

But when there has been no independent trespass, when the outer door of a dwelling has not been broken open, and the entry into the

(g) *Dale v. Birch*, 3 Campb. 347.

(h) *Hollier v. Laurie*, 3 C. B. 342.

house would be lawful, and protected by the process if the goods found therein should turn out to be the goods of the execution-debtor, the entry into the house cannot be separated from the seizure of the goods, but the whole cause of action may be stayed until the ownership of the goods has been determined by interpleader (i). If that is determined in favour of the sheriff, all further proceedings against him will be stayed; if it is decided against him, the action may be proceeded with for the recovery of damages for the trespass in the house as well as for the seizure of the goods (k).

If the execution-creditor has personally interfered in making the seizure, and directed the movements of the sheriff (ante, p. 416), so as to render himself liable to an action, the court or a judge has power to interfere for his protection, as well as for the protection of the sheriff, and to stay proceedings against him (l).

Actions against high-bailiffs of county courts and their assistants.—By the County Courts' Amendment Act, 19 & 20 Vict. c. 108, s. 21, it is enacted, that if an action be brought in the county court against an officer of the county court, the summons may issue in the district of which he is an officer, or in an adjoining district, the judge of which is not the judge of a court of which the defendant is an officer. And by the County Courts' Act, 9 & 10 Vict. c. 95, s. 138, notice of action is, as we have seen, required to be given to all persons acting in execution of that act. Officers of the county court, and parties acting in their aid by their command in the intended execution of the County Courts' Act, or of county-court process, are in general entitled to notice of action, and to an opportunity of tendering amends before action, and paying money into court after action (ante, p. 411). If the bailiff of a county court, under a warrant against the goods of A, by mistake takes those of B, this is an act done in pursuance of the County Courts' Act, which entitles the bailiff to notice of action (m).

Of the statutory protection to high-bailiffs, and persons acting by their order, or in their aid, in the execution of county-court warrants.—By the statute 13 & 14 Vict. c. 61, s. 19, it is enacted, that no action shall be brought against any high-bailiff or bailiff, or any person acting by his order, or in his aid, for anything done in obedience to any warrant under the hand of the clerk of the county court and the seal of the said court, until demand hath been made, or left at the office of such high-bailiff, by the party intending to bring such action, or by his attorney or agent, in writing,

(i) *Winter v. Bartholomew*, 11 Exch. 711.

(k) *Foster v. Prichard*, 2 H. & N. 151.

(l) *Carpenter v. Pearce*, 27 Law, J., Exch. 143.

(m) *Burling v. Harley*, 3 H. & N. 271; 27 Law, J., Exch. 258.

signed by the party demanding the same, of the perusal and copy of the warrant, and the same hath been refused or neglected for the space of six days after the demand; and in case, after demand and compliance therewith, by showing the warrant, and permitting a copy to be taken, any action shall be brought against such high-bailiff, bailiff, or other person acting in his aid, for any such cause as aforesaid, without making the clerk of the court who signed or sealed the warrant defendant; then, on producing or proving the warrant at the trial of the action, the jury shall give their verdict for the defendant, notwithstanding any defect of jurisdiction or other irregularity in the warrant; and if the action be brought jointly against the clerk and high-bailiff, or bailiff, or person acting in his aid, then, on proof of the warrant, the jury shall find for the high-bailiff or bailiff, and person so acting as aforesaid, notwithstanding such defect or irregularity.

And by 19 & 20 Vict. c. 108, s. 60, it is further enacted, that no officer of a county court in executing a warrant of a county court, and no person at whose instance any such warrant shall be executed, shall be deemed a trespasser by reason of any irregularity or informality in any proceeding on the validity of which such warrant depends, or in the form of such warrant, or in the mode of executing it, but the party aggrieved may bring an action for any special damage which he may have sustained by reason of such irregularity or informality against the party guilty thereof, and in such action he shall recover no costs, unless the damages awarded shall exceed forty shillings. Also (s. 55), that any warrant to a high-bailiff to give possession of a tenement under that statute, shall justify the bailiff named in the warrant in entering upon the premises named therein, with such assistants as he shall deem necessary, and in giving possession; but the entry must be made between the hours of nine in the morning and four in the afternoon, and the warrant must be executed (s. 56) within three months from the day it bears date.

Of the staying of proceedings in actions against high-bailiffs and officers of the county court.—The statute 9 & 10 Vict. c. 95, s. 118, enacts, that if any claim shall be made to goods or chattels taken in execution under the process of any county court holden under that act, or to the proceeds or value thereof by any landlord for rent, or by any person not being the party against whom such process has issued, it shall be lawful for the clerk of the court, upon application of the officer charged with the execution of such process, as well before as after any action brought against such officer, to issue a summons, calling before such court as well the party issuing the process as the party making the claim, and thereupon any action which may have been brought in any superior or inferior court in respect of such claim shall be stayed, and the court in which the

action has been brought, or any judge thereof, on proof of the issue of the summons, and that the goods and chattels were so taken in execution, may order the party bringing the action to pay the costs of all further proceedings in such action; and the judge of the county court is to adjudicate upon the claim, and make such order in respect thereof and of the costs as to him shall seem fit. And it has been further enacted, that where any claim shall be made under this section, the claimant may deposit with the plaintiff either the amount of debt or the value of the goods claimed, such value to be fixed by appraisement in case of dispute, and to be paid into court to abide the decision of the judge upon the claim, or the sum which the bailiff shall be allowed to charge as costs for keeping possession of such goods until such decision can be obtained, and in default of the claimant so doing, the bailiff shall sell such goods as if no such claim had been made (n).

When the bailiff or officer enters the house of a third party and seizes goods therein, he is justified if they belong to the execution-debtor. If they do not, he is a trespasser. The common mode of dealing with a case of this sort is to make an order under the Interpleader Act, directing an issue to be tried to determine the ownership of the goods seized, and prohibiting any action against the bailiff until that question has been determined. If it is decided in favour of the bailiff, the court will prohibit all further proceedings against him in the action, unless there is some substantive cause of complaint beyond that of entering the house to make the seizure (o). If it is decided against the bailiff, and it is found that he has entered the house and seized the goods of the wrong party, and has committed a trespass by entering the house as well as by seizing the goods, damages may then be recovered for the unlawful entry into the house, as well as for the seizure of the goods (p).

If the action is brought for an unlawful breaking and entering of the outer door of a dwelling-house, as well as for an unlawful seizure of the goods, the judge has no power to stay the proceedings, as the cause of action is quite independent of any question of ownership of the goods, and does not, as we have seen, fall within the provisions of the Interpleader Acts (q).

Of the plaintiffs in actions against sheriffs.—To entitle a party to sue a sheriff or his officer for neglecting the duties of his office, he must show that he had sued out some process which entitled him to the performance of some duty at the hands of the sheriff which the latter has neglected or negligently executed, or he must show that he has been damnified either

(n) 10 & 20 Vict. c. 108, s. 72.

(o) *Jessop v. Crawley*, 15 Q. B. 212.(p) *Poster v. Pritchard*, 2 H. & N. 151;

26 Law, J., Exch. 215.

(q) *Cater v. Chignell*, 15 Q. B. 210.*Hollier v. Laurie*, 3 C. B. 330.

in his person or his property by some act of trespass, or wrongful and unauthorised proceeding, on the part of the sheriff; or if he sues upon an act of parliament giving damages to the party grieved, he must show that he is the party grieved within the meaning of the statute (r).

Of the defendants in actions for wrongs done under colour of legal process.—The sheriff is liable, as we have seen, for all acts done and neglects of duty by his bailiffs and officers in the execution of a writ, on the ground that if the sheriff thinks fit to commit the execution of a writ, which he is bound to execute, to another, he is responsible if that person does not execute it properly, and is in the same condition as if he had executed it himself; the case of a sheriff differing in this respect from the liability of an ordinary principal for the acts of an agent who does not pursue the authority committed to him. Therefore, if a sheriff's officer arrests a wrong person, or arrests the right person after the return day, or takes a wrong person's goods under a fi. fa., or even if he arrest under a writ of fi. fa., or is guilty of extortion in insisting on being paid money as the price of liberation from imprisonment under a ca. sa. the sheriff is liable (ante, pp. 465, 466). Though none of these acts are done in pursuance of the authority of the writ, yet they are done in the execution, or, as it is said, under the colour of it; and the sheriff is exactly in the same position as if he had done those acts himself (s). But if after the writ has been executed the officer takes upon himself to do things for which he has no colour of authority, the sheriff will not be responsible for his acts. Thus, if a debtor who has been arrested under a ca. sa. induces the officer, contrary to his duty in that behalf, to accept the amount of the debt and costs, and discharge him, and the officer neglects to pay over the money to the attorney of the execution-creditor, and the debtor is again arrested under a fresh writ upon the same judgment, the sheriff is not, as we have seen, responsible to such debtor for the default of his officer in not paying over the money, as the sheriff has given him no authority to receive the money, and the transaction is in the nature of a private arrangement between the debtor and the officer (ante, p. 466).

The sheriff and his officer, who, by inadvertence or mistake, have entered the house and seized the goods of the wrong person, or have arrested a wrong party in the execution of legal process, are responsible for the trespass, "although the taking be by the showing of the party to the suit" (t); and so are all persons, whether plaintiffs or attorneys in the action, or strangers who interfere in any way, by giving directions or assis-

(r) *Woodgate v. Knatchbull*, 2 T. R. 158. *Boyer v. Higgins*, 14 C. B. 14. *Hollis v. Marshall*, 3 H. & N. 755.

(s) *Woods v. Finnis*, 7 Exch. 371.

(t) 2 Roll. Abr. 552. *Jarman v. Hooper*, 7 Sc. N. R. 863; 13 Law, J., C. P. 63; 6 M. & Gr. 848.

tance, or officiously volunteering information to the officers (ante, p. 417); for every person who procures or directs the commission of an act of trespass is as much responsible for the injury as the person who actually commits it.

Sheriffs' officers executing a writ of ca. sa. are not the agents or bailiffs of the plaintiff for whose benefit the writ is issued, and if they arrest a wrong party the plaintiff in the action is not responsible for their misconduct, unless either he or his attorney have personally interfered and have superintended or directed the movements of the sheriff or his officers (u). If the plaintiff in an action, or his attorney, does no more than set the court in motion, he is no trespasser, notwithstanding that such court should, on his motion, do an act of trespass by its officers, unless by special plea he admits and undertakes to justify his concurrence in the act, in which case he can only make out his justification by showing a legal authority under which he acted (x); and an attorney who merely delivers a writ of execution to the sheriff, and does not take upon himself to give wrong directions, and does not, by word or act, induce the officer to seize the wrong party, is not responsible for the mistakes of the officer and for a trespass committed by the latter in seizing the goods of the wrong person, or seizing beyond the limits of his bailiwick, although he believes that the officer is about to go wrong and to exceed his duty (y).

It has been held, that if the attorney gives wrong directions to the sheriff or his officers, and thereby causes them to seize the goods of the wrong man, the client is responsible for the act of the attorney (z).

If goods which have been let to hire to an execution-debtor have been seized and sold by a sheriff under the writ of execution, the sheriff cannot, as we have seen, be sued, unless it be proved that some actual damage has been sustained by the plaintiff by the act of the sheriff (a); but the purchaser who takes away the goods without any right or title so to do, may be made responsible in damages for the conversion of the property. If acts of trespass have been committed under colour of legal process, which has been set aside as irregular, both the client who commands the attorney and the attorney who sues out the process are, as we have already seen, responsible as principals in the commission of the acts of trespass done by their procurement and commandment (b). They are in the same situation

(u) *Wilson v. Tummon*, 6 M. & Gr. 244; 6 Sc. N. R. 906. *Walley v. McConnell*, 13 Q. B. 911.

(x) *Kinning v. Buchanan*, 8 C. B. 291. *Abley v. Dale*, 10 C. B. 62. *Painter v. Liv. Gas Co.* 3 Ad. & E. 433.

(y) *Sowell v. Champion*, 6 Ad. & E. 417.

(z) *Jarmain v. Hooper*, 6 M. & Gr.

850; 7 Sc. N. R. 681. *Collett v. Foster*, 2 H. & N. 361. *Brooks v. Hodgkinson*, 4 ib. 712; ante, p. 418.

(a) *Tancred v. Allgood*, 4 H. & N. 438; 28 Law. J., Exch. 362.

(b) *Codrington v. Lloyd*, 4 Ad. & E. 440. *Barker v. Braham*, 3 Wils. 370. *Bates v. Pilling*, 6 B. & C. 39.

after it has been set aside as if they had themselves, orally or by writing, desired the sheriff or his officer to make the seizure (c).

Of the plaintiff's declaration of his cause of action.—The ordinary form of declaration for a trespass, or for the conversion of chattels, or for an assault or false imprisonment (ante, pp. 224, 418), is applicable to cases where judges of inferior courts have ordered or directed a seizure of the person or the property of the plaintiff in respect of matters over which they had no jurisdiction, or where they have exceeded their jurisdiction, and have rendered themselves liable to an action for damages: also where sheriffs and ministerial officers have exceeded their authority, and committed unauthorized acts of trespass in the execution of the process intrusted to them.

Declaration against a sheriff for not executing the Queen's writ, or for an escape.—The principle on which an action is maintainable against a sheriff for a neglect of duty in not arresting or not making a levy in obedience to the Queen's writ directed to him, or for permitting an escape, is not simply because the plaintiff has sued out a writ and delivered it to the sheriff and the sheriff has not obeyed it, but because in mesne process he has a cause of action, in final process he has a judgment against the party defendant, which gives him an interest in the writ, and creates a duty in the sheriff towards him (d). There is no duty due from the sheriff to the party suing out a writ, unless he be entitled so to do. It is essential, therefore, in an action against a sheriff for disobeying a ca. sa. or a fi. fa., that the party should show that he had a judgment in his favour.

The title to sue out a capias under 1 & 2 Vict. c. 110, s. 3, depends upon the party being a plaintiff in a suit, as well as having a cause of action. By section 3 a plaintiff alone can sue it out, by section 5 he must do so after the commencement of the suit, which, by s. 2, must be begun by a writ of summons. The plaintiff, therefore, in an action against the sheriff for not arresting a debtor under a capias founded on 1 & 2 Vict. c. 110, s. 3, should show, on the face of his declaration, that he had a cause of action against such debtor and commenced an action against him, and should set forth the making of an affidavit by him, as the plaintiff in such action, pursuant to the requirement of the statute in that behalf; the obtaining of a special order from a judge to hold the debtor to bail; the issue of a writ of capias to the sheriff (setting out the writ and endorsement thereon); the delivery of the writ to the sheriff, and the sheriff's breach of duty in not executing it.

(c) *Tindal, C. J., Wilson v. Tummon*, 6 So. N. R. 906; 6 M. & Gr. 236. *Green* v. *Elgie*, 5 Q. B. 114.

(d) *Jones v. Pope*, 1 Saund. 38 b.

If the plaintiff complains against the sheriff for not arresting under a ca. sa., or for not levying under a fi. fa., or for an escape, he should, after showing the recovery of his judgment, state the issue of the writ thereon, for the purpose of having execution of the said judgment (setting forth the substance of the writ and the indorsement thereon), the delivery of such writ to the sheriff to be executed, and should then disclose the sheriff's neglect of duty, either in not making the arrest, or in making the arrest and gaining possession of the person of the debtor, and then permitting him to escape, or in not levying under a fi. fa., showing that after the delivery of the writ to the sheriff, and before the return thereof, there were goods of the debtor within the defendant's bailiwick, out of which he could have levied the monies directed by the writ to be levied.

Declarations against sheriffs for removing goods taken in execution, without paying rent due to the landlord, should show that a messuage, lands or tenements, had been demised by the plaintiff to a named tenant for a certain term, at a specified rent, payable half-yearly; that a certain sum of money, being half a year's or a year's rent, as the case may be, of the said messuage, &c., became due to the plaintiff, and that during the existence of the tenancy, and whilst the said rent was in arrear, the defendant then being sheriff, seized certain goods and chattels of the tenant, then being upon the demised messuage, lands or tenements, &c., under a writ of execution against the said tenant; that the defendant at the time of such seizure, and before the removal of the goods from the premises, had notice of the half-year's or year's rent so being due and in arrear (e), and that he nevertheless wrongfully removed the said goods before the plaintiff had been paid the said arrears of rent, contrary to the statute in that behalf made (f).

Declarations against sheriffs for treble damages for extortion should set forth the recovery of a judgment; the issue of a writ of fi. fa. to the sheriff; the indorsement on the writ; the delivery of the writ to the defendant as sheriff of some specified county; the seizure by the defendant as sheriff; the amount of the levy; and that the defendant, by reason and colour of his office, wrongfully received and took from the plaintiff, for the serving and executing the said execution, a certain specified sum (g), averring it to be a larger consideration and recompense than is limited and appointed to be taken in that behalf (h). When the action is brought against the sheriff's officer, the declaration should set forth the warrant

(e) *Andrews v. Dixon*, 3 B. & Ald. 645.

(f) 8 Anne, c. 14, s. 1. *Smallman v. Pollard*, 6 M. & Gr. 1009. *Riseley v. Ryle*, 11 M. & W. 16. *Thurgood v.*

Richardson, 7 Bing. 428.

(g) *Ashby v. Harris*, 2 M. & W. 673.

(h) *Pilkington v. Cooke*, 16 M. & W. 615.

made and delivered by the sheriff to the defendant, as one of his bailiffs, to be executed, and the levy made thereunder by the defendant, and the extortionate charges then made by him (i). When the declaration is for extortionate charges on the execution of several writs, the declaration should show what sum ought to have been taken, and what was the extortionate charge on each writ (k). It is not necessary to recite the statute; it is enough to state that the thing was done contrary to the form of the statute in such case made and provided (l).

The plea of not guilty in actions for taking, detaining, or converting goods and chattels, operates, as we have seen, as a denial of the wrongful act complained of, but not of the plaintiff's property in the goods and chattels; and no other defence than such denial is admissible under that plea (ante, pp. 225, 226). In actions for an assault and false imprisonment, the plea of not guilty merely puts in issue the fact of the commission of the trespass (ante, p. 419), and in actions against a sheriff or his officers for an escape, the plea of not guilty operates as a denial of the neglect or default of the sheriff or his officers, but not of the debt, judgment, or preliminary proceedings (m). All matters of inducement set forth in the declaration, if intended to be denied and put in issue by the defendant, should be specially traversed (n); and all matters of justification and excuse must, as we have seen, be specially pleaded, and cannot be given in evidence under the general issue (o).

A justification, therefore, of an imprisonment, on the ground that it was an act done by a judge of a court of record acting in his judicial capacity, must be specially pleaded, except when the facts are authorized by act of parliament to be given in evidence under the plea of not guilty by statute (ante, p. 420).

Pleas of leave and license.—If the defendant had the plaintiff's sanction or authority for the commission of the wrongful act or breach of duty of which he complains, he must plead a plea alleging that he did what is complained of by the plaintiff's leave.

Pleas showing that the plaintiff is estopped by his own acts from complaining of the injury he has sustained.—It is a good answer on the part of a sheriff or his officers to an action for false imprisonment, to plead that a writ of ca. sa. had issued, directing the defendant, a sheriff, to take one A. B., and that the plaintiff represented to the defendant that he, the

(i) *Wright v. Greenacre*, 10 Q. B. 3.

(k) *Berton v. Lawrence*, 5 Exch. 816.

(l) *Holmes v. Sparkes*, 12 C. B. 251.

(m) Reg. Gen. Hil. Term, 16 Vict. c. 16;
1 Ell. & Bl. App. lxxi. *Hodges v. Paterson*, 26 Law, J., Exch. 223.

(n) Post, ch. 20, s. 1. *Traverse of the whole or part of a declaration.*

(o) Ante, pp. 225-227. *Howden v. Standish*, 6 C. B. 518. *Lewis v. Alcock*, 3 M. & W. 188. *Wright v. Lanson*, 3 ib. 739.

plaintiff, was the said A. B., and that the defendant took him into custody upon the writ in consequence of his representation (*p*).

Pleas of justification must confess the assault or trespass, and set forth the facts and circumstances which justified it (ante, pp. 422–425). A good justification for an assault and imprisonment is disclosed by a plea alleging that at the time when the trespass was committed the defendant was sheriff of a certain specified county, and in that character was presiding at an election of knights of the shire to serve for the county in parliament; that the plaintiff made a great noise and disturbance at the election, and molested and obstructed him in the execution of his duty, upon which he ordered a constable to take the plaintiff into custody, and to carry him before a justice of the peace, to be dealt with according to law (*q*).

Pleas of justification of acts of trespass in the execution of legal process.—A sheriff who proceeds to justify an act of trespass in the execution of a writ, does enough if he sets forth the writ of execution in obedience to which he acted, unless, by taking an indemnity, he has so identified himself with the judgment-creditor as to place himself in the same position as the latter, in which case he must set forth and rely upon the judgment as well as upon the writ. If the plaintiff in the action, however, is not the execution-debtor, but a third party suing the sheriff, the latter must show not only the writ of execution but the judgment. Therefore, where the sheriff or his bailiff sets up a claim against a plaintiff, to goods taken in execution by him under a writ against a third party, the sheriff must show a judgment against such third party, and his production of the writ of execution alone is not sufficient (*r*); and the reason for this seems to be, because the party against whom the judgment has passed might have applied to set it aside if there were error attending it; and if he omit to do so, it is presumed, from his acquiescence, that the judgment is right (*s*). A plea of justification by a private person, who has gone with the sheriff's officer to make an arrest, or who has personally interfered in aid of the sheriff, must show the judgment as well as the writ; the officer, the writ and warrant only, unless he joins in pleading the other party, in which case he foregoes the benefit of his warrant (*t*). The stranger must set out the proceedings at length if he justifies under them, and if he does not, the plea of the officers who join with him in his justification is bad (*u*). A

(*p*) *Dunston v. Paterson*, 26 Law, J., C. P. 267.

(*q*) *Spilsbury v. Micklethwaite*, 1 Taunt. 146.

(*r*) *White v. Morris*, 11 C. B. 1016; 21 Law, J., C. P. 185.

(*s*) *Bayley, J., Doe v. Murlep*, 6 M. & S. 114.

(*t*) *Andrews v. Morris*, 1 Q. B. 17. *Turner v. Felgate*, 1 Lev. 95.

(*u*) *Morse v. James, Willen*, 128.

plea of justification by a sheriff's officer should set forth the warrant under which he acted (x).

Justification under process from inferior courts.—Formerly the process of an inferior court issued in a matter over which the court had no jurisdiction was an absolute nullity, and afforded no protection to those who had acted *bond fide* in the execution of it; but the law has been materially altered in this respect, and ample protection afforded, as we have seen (ante, pp. 485–487), to all county-court officers acting in the execution of county-court process, whether the court had jurisdiction in the matter or not, and also to constables and officers acting in the execution of warrants of justices (post, ch. 14).

Replications.—Where a man has abused an authority or license which the law gives him, by which he becomes a trespasser *ab initio*, if the defendant pleads such license or authority the plaintiff must reply the abuse (y). Replications to pleas justifying under process which has been set aside, usually allege that the writ under which the defendant attempts to justify was irregularly sued out of the said court of, &c., and that afterwards, by a certain order made by, &c., one of the judges, &c., bearing date, &c., and which order was afterwards made a rule of court, it was upon hearing, &c., and reading, &c., ordered that the said writ should be set aside for irregularity (z).

Evidence at the trial—Proof on the part of the plaintiff.—In actions against sheriffs for not arresting under a ca. sa., or not making a levy under a fi. fa., or for permitting an escape, the plaintiff must, as we have seen, prove a judgment in his favour (a), the issue of a writ thereon, and the delivery of the writ to the sheriff to be executed, if those facts are traversed and put in issue by the pleadings (ante, pp. 490–493). The plaintiff must also prove the failure of the sheriff to make the arrest or the levy pursuant to the exigency of the writ, or to retain the judgment-debtor in his custody after he had arrested him (ante, p. 477), if the defendant denies the breach of duty by a plea of not guilty. If it appears that the plaintiff has sued out void process, or that the judgment on which the process is founded is a void judgment, the plaintiff has no cause of action against the sheriff for neglecting to execute it, or for discharging a prisoner taken under it; but if the judgment is erroneous only, the sheriff cannot take advantage of the error (b).

(x) *Hewitt v. Macquire*, 7 Exch. 80.
Coles v. Michill, 3 Lev. 20.

(y) 1 Wms. Saund. 300 h.
 (z) *Codrington v. Lloyd*, 8 Ad. & E. 449. *Jones v. Williams*, 8 M. & W. 357.

Rankin v. De Medina, 2 D. & L. 813.

(a) *Williams v. Griffiths*, ante.

(b) *Gold v. Strobe*, Carth. 148. *Shirley v. Wright*, Cro. Jac. 775; Bull. N. P. 66.

Proof of judgments, writs, and process from the superior courts.—The usual mode of proving a judgment of a superior court is by an examined copy. The witness who produces the copy should prove that he examined it with the original record, and that the latter came from the proper custody (c). Writs and warrants, before they have been returned and have become matter of record, must be proved by the actual production of the instrument itself. Notice to produce the original writ, therefore, must in general be given to the sheriff, in an action against him, for a breach of duty in neglecting to obey it.

Proof of the delivery of the writ to the sheriff to be executed.—If a writ which has been delivered to the sheriff to be executed has been returned, and has become matter of record, the writ, and its delivery to the sheriff, may be proved by an examined copy of the record, without the production of the writ itself (d). If upon search the writ does not appear to have been returned, it will be presumed to be in the possession of the sheriff, and notice should be given to him to produce it; and if he fails to produce it at the trial, the plaintiff may produce and prove its contents by a copy, or by oral testimony, and show that it was delivered at the sheriff's office to be executed.

Proof that a party has acted as sheriff is *prima facie* evidence of his being sheriff, without proof of his appointment (e).

Proof of the sheriff's having directed or authorized the commission of the wrongful act.—In order to charge the sheriff with the act of the bailiff, it is not enough, as we have seen, to show that the party doing the act was a sheriff's officer duly appointed, and apparently acting as the sheriff's officer, and that he had given a bond of indemnity to the sheriff. It must be shown that he had a special authority from the sheriff to do the particular act of which the plaintiff complains. For this purpose the officer should be called, upon a subpoena, duces tecum, to produce the original warrant under which he acted, which being the best evidence of the fact no other can be admitted, unless it is improperly withheld after notice to produce it; in which case secondary evidence may be given of its contents (f). If the warrant has been returned by the officer to the under-sheriff, notice should be given to the latter, or to the attorney of the sheriff, to produce it, if the sheriff is still in office (g). If the defendant has gone out of office, and the warrant has been sent to the persons who acted as his London agents whilst he was in office, and who are also his attorneys on the record, notice to them to produce the warrant is sufficient

(c) *Reid v. Margison*, 1 Campb. 469; post, ch. 19.

(d) *Ramsbottom v. Buckhurst*, 2 M. & S. 585.

(e) *Bunbury v. Matthews*, 1 C. & K. 380.

(f) *Drake v. Sikes*, 7 T. R. 113.

Minshull v. Lloyd, 2 M. & W. 458.

(g) *Taplin v. Atty.*, 3 Bing. 168.

to entitle the plaintiff to give secondary evidence of the contents of the warrant (h).

On production of the warrant bearing the sheriff's seal of office, it is right to presume that the seal was properly affixed, unless evidence to the contrary is adduced; and on production of the sealed warrant the plaintiff establishes a *prima facie* case against the sheriff, and if the under-sheriff improperly issued it without having received a writ upon which it purports to be founded, the fact must be proved by the defendant as an answer to the plaintiff's case (i).

But the production of the warrant is not the only medium by which the privity of the sheriff with the act of the bailiff may be established. If the sheriff takes the fruits of an arrest made or execution levied by the officer, and ratifies and adopts the acts of the latter, he will have recognized him as his authorized agent in the particular transaction, and will be responsible accordingly (k). If it be proved that by the ordinary course of business in the under-sheriff's office the name of the officer who is to execute the writ is indorsed on the process, and the writ so indorsed is returned and filed, and the plaintiff offers in evidence a writ with the name of a bailiff indorsed upon it, and proves that the indorsement was made at the under-sheriff's office, or was made before it got there, and was afterwards adopted there, it will be *prima facie* evidence that the person named in the indorsement was the person authorized by the sheriff to execute the writ, for if the warrant be granted to a different officer the sheriff has the means of proving it (l). But the mere production of the writ and indorsement, without proof that the indorsement was made in the sheriff's office, or adopted by the sheriff, will not be sufficient to implicate the sheriff (m).

If upon the pleadings the defendant, as sheriff, admits his participation in the act of the officer, it is of course unnecessary to produce and prove a warrant (n).

Evidence of negligence—Proof of false return to a writ.—The general duties and responsibilities of sheriffs and their officers have already been pointed out (ante, pp. 464–476), and also the nature of the trespasses and injuries which are frequently committed by them in the execution of civil processes (ante, pp. 467–471). If it be proved that a debtor, whom the sheriff ought to have arrested in obedience to a writ lodged in his hands, did not abscond, but continued in the daily exercise of his

(h) *Suter v. Burrell*, 2 H. & N. 867.

(i) *Gibbins v. Phillips*, 7 B. & C. 535, note.

(k) *Martin v. Bell*, 1 Stark. 416. *Jones v. Wood*, 3 Campb. 228. *Woodgate v.*

Knatchbull, 2 T. R. 155.

(l) *Scott v. Marshall*, 2 Cr. & Jerv. 242. *Tealby v. Gascoigne*, 2 Stark. 202.

(m) *Hill v. Sheriff of Mid.* 1 Taunt. 8. (n) *Reed v. Thoyts*, 6 M. & W. 415.

usual occupation, or appeared publicly as usual, or was to be found at his home or his usual haunts, and the sheriff neglected to arrest him, and returned non est inventus to the writ, there will be abundant evidence of a false return (o).

When admissions by an under-sheriff and bailiffs are evidence against the sheriff.—The statements and declarations of an under-sheriff are no evidence to charge the sheriff, unless they accompany some official act, or unless they tend to charge himself, he being in truth the real party in the cause (p). What a bailiff says in a general conversation with any indifferent person, certainly is not evidence against the sheriff; but declarations made by him in the course of the execution of a writ to parties interested in making the inquiry, are evidence against the sheriff in the particular matter to which they relate (q).

Proof of the removal of goods taken in execution without paying the landlord's rent.—If the material facts of the tenancy, the rent in arrear, the seizure of the goods, the defendant's knowledge of the rent being in arrear, and the removal of the goods without payment of it, as set forth in the plaintiff's declaration, are traversed by the pleadings, the plaintiff must establish them in evidence by production and proof of a written demise, where the tenant holds under a writing (r), and by showing that a certain ascertained rent was payable and in arrear at the time of the levy, knowledge thereof on the part of the sheriff or his officer (s), and an actual removal of the goods without payment of the rent (t).

Proof on the part of the sheriff of the process under which he acted.—When the existence of the authority under which the sheriff acted is put in issue by the pleadings, it is in general enough, as we have seen, to prove the writ under which he acted. If the plaintiff, in order to prove his case against the sheriff, puts in evidence the warrant from the sheriff to his officer, he does not thereby make the recital in the warrant of the writ to the sheriff evidence for the latter of the writ, and dispense with the necessity of proof of it by the sheriff (u).

Proof of rent being in arrear at the time of the levy.—If the sheriff, in order to support a return of nulla bona, or to defend himself against an action for negligence in not levying under a writ of fi. fa., is driven to show that rent was due to the landlord, the lease itself must be produced

(o) *Beckford v. Montague*, 2 Esp. 476.
Brown v. Jarvis, 1 M. & W. 704. *Randell v. Wheble*, 10 Ad. & E. 719.

(p) *Snowball v. Goodricke*, 4 B. & Ad. 543.

(q) *North v. Miles*, 1 Campb. 390.
Jacobs v. Humphrey, 2 Cr. & M. 414.

(r) *Auguston v. Challis*, 1 Exch. 279.

(s) *Riseley v. Ryle*, 11 M. & W. 16.

Hoskins v. Knight, 1 M. & S. 245.
Saunders v. Musgrave, 6 B. & C. 524.
Andrews v. Dixon, 3 B. & Ald. 645.

(t) *Smallman v. Pollard*, 6 M. & Gr. 1001.

Wharton v. Naylor, 12 Q. B. 679.
 (u) *White v. Morris*, 11 C. B. 1033;
 overruling *Bessey v. Windham*, 6 Q. B. 166.

if it appear that there was a written demise (x). In an action against a sheriff for neglecting to levy under a *fi. fa.*, it is not enough for the sheriff to show that the landlord made a claim for a year's rent, which exceeded the value of the goods. The sheriff must prove that the rent was actually due. Where the sheriff relied upon an actual payment by him of rent claimed to be due to the landlord, Lord Ellenborough held, that if he had before him reasonable evidence of the rent being in arrear, and a sight of the lease, where the debtor held under a lease, there would be a *prima facie* case in favour of the sheriff, and it would be for the plaintiff to show that the rent was not due (y). If the sheriff has given notice to the execution-creditor of the claim of rent, and the latter assents to the proceedings of the sheriff in respect thereof, he cannot of course afterwards turn round and complain of what he has himself sanctioned, although both he and the sheriff may have been deceived, or have acted under a misapprehension, or taken some erroneous view of the matter (z).

Proof on the part of the sheriff in an action for an escape.—If the sheriff relies upon a plea of leave and license in an action for an escape, he must show that he had the plaintiff's authority for the discharge of the prisoner in his custody. By the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76, s. 126), it is enacted, as we have seen (ante, p. 444), that a written order under the hand of the attorney in the cause, by whom any writ of *ca. sa.* shall have been issued, shall justify the sheriff in discharging such party.

Proof of proceedings in the County Court.—The stat. 9 & 10 Vict. c. 95, s. 111, requires the clerk of every county court, to cause a note of all complaints, judgments, orders, and proceedings in the court, to be fairly entered in a book, to be kept at the office of the court, and the entries in this book, or a copy thereof, bearing the seal of the court, and purporting to be signed and certified as a true copy by the clerk of the court, are to be admitted in all courts as evidence of such entries, and of the proceedings, and of the regularity thereof, without any further proof.

Damages recoverable in actions against sheriffs and officers—Negligence and breach of duty.—Whenever it has been proved that the sheriff owed a duty to the plaintiff, and that there has been a breach of that duty, nominal damages are recoverable, although there is no proof of any actual pecuniary damage having been sustained by the plaintiff. When a debtor has been taken in execution and lodged in gaol, the execution-creditor has a right to have him kept in gaol; if, therefore, the sheriff allows the debtor to go beyond the limits of the prison for ever so short a period, there is an

(x) *Augustine v. Challis*, 1 Exch. 279.

(y) *Knightley v. Birch*, 3 Campb. 523.

(z) *Stuart v. Whittaker*, R. & M. 310.

infringement of the legal right of the execution-creditor, in respect of which damages are recoverable by him, though no actual damage be proved (a). Whenever a sheriff, having had a writ of execution put into his hands, unnecessarily delays putting it in force, and there is no proof of actual pecuniary damage from the delay, nominal damages are recoverable, for the plaintiff's right to have the body of his debtor detained has been invaded through the breach of duty by the sheriff. If actual loss has been sustained, the plaintiff will be entitled to recover the amount of such loss (b). And if the sheriff has improperly delayed the execution of a writ, and the plaintiff has been put to expense in trying to have the writ executed, he may be entitled to recover these expenses as part of the damages (c).

In an action against a sheriff for not selling the execution-debtor's share in chattels, in which he was jointly interested with another person, Lord Ellenborough said to the jury, "I cannot lay down any measure for your assessment of damages short of half the value. In giving any other you will take a leap in the dark. Some purchasers might think the value depreciated by the co-partnership, others might not regard the circumstance" (d).

In an action against a sheriff or his officer for the wrongful taking of goods, the plaintiff, if he recovers a verdict, is entitled to the full value of the goods. It is not competent to the sheriff to say as to part of it, "I have paid rent," for, being a wrongdoer, he had no right to take upon himself to apply the proceeds of the wrongful sale (e). Whenever a publick officer has wrongfully seized and detained goods from the owner, the latter is entitled to recover all the loss resulting from the wrongful act, so that if the property detained has fallen in value in the market, the plaintiff is entitled to add the amount of that to the other damage he has sustained (f). But if a sheriff takes goods in execution after an act of bankruptcy, and sells them, the jury may, in an action by the assignees for the unlawful taking, allow to the sheriff the expenses of the sale, if they think the assignees must have sold the goods if they had not been sold by the sheriff (g).

If a sheriff or his officer threatens to make a levy on goods which belong to the plaintiff, and the latter, in order to prevent his goods from being seized and sold, pays a sum of money to such sheriff or officer, he is

(a) *Williams v. Mostyn*, 4 M. & W. 153.

(b) *Tifton v. Hooper*, 6 Q. B. 474.

(c) *Mason v. Paynter*, 1 Q. B. 974.

(d) *Tyler v. Duke of Leeds*, 2 Stark. 222.

(e) *White v. Binstead*, 13 C. B. 308; 22 Law, J., C. P. 115.

(f) *Barrow v. Arnaud*, 8 Q. B. 609.

(g) *Clark v. Nicholson*, 8 C. & P. 712; 1 C. M. & R. 724.

entitled to recover back the money on proving that the sheriff had no right to make the levy or seize the goods he threatened to seize (h).

In actions for unlawfully removing goods without paying rent due to the landlord, the damages recoverable by the latter are not limited to the amount realized by the sheriff on the sale of the goods, but the landlord may recover the actual damage sustained by him by the sheriff's neglect of duty, whatever that may be (i).

Assessment of damages in actions against a sheriff for an escape.—"The true measure of damages," observes Jervis, C. J., "in actions against a sheriff for an escape (5 & 6 Vict. c. 98, s. 31), is the value of the custody of the debtor at the moment of the escape, and no deduction can be made therefrom on account of anything which the plaintiff might have obtained by diligence after the escape. At first sight this principle may appear to conflict with the rule which permits a re-capture, upon fresh pursuit, before action brought to be pleaded in bar to an action for an escape on final process; because the circumstances of a debtor may greatly alter between his escape and his re-capture. But the reason why a re-capture is so pleadable removes this apparent conflict. The debtor is supposed never to have been out of custody, and the alteration in his circumstances is therefore immaterial.

"The damages to be paid by the sheriff must be assessed according to the circumstances of each particular case. If the execution-debtor had not the means of satisfying the judgment at the moment of the escape, the plaintiff will have lost only the security of the debtor's body, and the damages may be small. If the execution-debtor had the means of satisfying the judgment at the moment of the escape, and has wasted those means since the escape, it is plain that the plaintiff has lost the chance of obtaining satisfaction of his judgment through the sheriff's neglect, and the jury would be justified in giving the full amount of the execution. It may be said that the plaintiff might, by diligence, have arrested the debtor before he had the opportunity of wasting his means; but so might the sheriff: he may retake a debtor upon fresh pursuit in any county, without an escape warrant, and the fact of the writ being now returnable immediately will not prevent him from so doing: for the debtor who has wrongfully escaped cannot insist that he is not still in custody. The rule might be supposed to operate unjustly towards the sheriff where the execution-debtor has the means of paying the debt at the moment of the escape, and still continues notoriously in solvent circumstances. In this case the value of the custody was the amount of the debt, and the plaintiff

(h) *Falpy v. Manley*, 1 C. B. 602.

(i) *Forster v. Hilton*, 1 Dowl. P. C. 38. *Calvert v. Jolliffe*, 2 B. & Ad. 421.

will be entitled to recover substantial damages. It is true that the recovery of such damages will not satisfy the execution; and the debtor may be retaken by the plaintiff, for the debtor cannot take advantage of his own wrong and avail himself of the recovery against the sheriff. On the other hand, the sheriff is not damnified, for he may retake the debtor, or recover against him by action, the amount which he has been compelled to pay. If the laches of the plaintiff could be used to mitigate the damages against the sheriff, the plaintiff would be compelled in every case to issue a fresh writ, and incur expense, to relieve himself to some extent from the consequences of the sheriff's negligence."

"It must not, however, be understood that the plaintiff's conduct can, under no circumstances, have a material bearing upon the damages. If he has done anything to aggravate the loss occasioned by the sheriff's neglect, or has prevented the sheriff from re-taking the debtor, the damages would be materially affected by such conduct" (k).

Special damages.—All special and extraordinary damage, which is the natural and direct result of the wrongful act of which the plaintiff complains, are recoverable by him if they are set forth and claimed in the declaration (l). The costs of setting aside a judgment for irregularity, cannot be made the subject of special damage in an action against the plaintiff or his attorney for seizing the plaintiff's goods under colour of the irregular judgment, if such costs have been applied for, and refused by, the court on motion (m).

Aggravated trespasses—Exemplary damages.—Where trespasses of a serious nature have been committed by officers of the law under colour of legal process, exemplary damages are recoverable. Violent and illegal conduct on the part of officers charged with the execution of legal process "is calculated to lead to dangerous conflicts; and when it is proved to the satisfaction of a jury to have taken place, the proper amount of damages to be awarded must depend so much upon the general circumstances that it is very difficult to discover any standard by which to measure the amount" (n); and the court will not interfere, on behalf of the sheriff or his officers, with the constitutional functions of the jury in assessing the damages, unless it appears that the defendant making the application was not implicated in the aggravations justifying the amount of damages as against the sheriff (o).

Recovery of treble damages in cases of extortion by sheriffs and their officers.—If the plaintiff, in an action against a sheriff for extortion,

(k) *Arden v. Goodacre*, 11 C. B. 375.

(l) Ante, pp. 235, 392, 431; post, ch. 31.

(m) *Loton v. Devereux*, 3 B. & Ad. 345.

(n) *Duke of Brunswick v. Slouman*, 8 C. B. 331.

(o) *Gregory v. Cotterell*, 1 Ell. & Bl. 369; 22 Law, J., Q. B. 217.

frames his declaration on the statute of Elizabeth (*ante*, pp. 480, 491) for the recovery of treble damages, the jury should be asked to assess the actual damage sustained, and the finding should be entered upon the record as the actual damage, so as to entitle the plaintiff to judgment for treble the amount found by the jury (*p*).

(*p*) Post, ch. 20, s. 1, DOUBLE AND TREBLE DAMAGES.
Buckle v. Beves, 4 B. & C. 154.

CHAPTER XIV.

OF TRESPASSES AND INJURIES COMMITTED IN THE EXECUTION OF WARRANTS AND ORDERS OF JUSTICES OF THE PEACE—RESPONSIBILITY OF MAGISTRATES, CONSTABLES, AND THEIR ASSISTANTS, AND THE PARTIES SETTING THEM IN MOTION.

SECTION I.—*Of trespasses committed in the execution of warrants and orders of justices.*—Of the general jurisdiction of justices—Their powers and authorities under particular statutes—When their authority is ousted by a claim of title—Their exemption from liability in respect of the exercise of judicial functions or a discretionary power, except where they are themselves personally interested—Wrongful commitments—Summary convictions—Informations, orders, and adjudications—Variances—Disclosure of jurisdiction—Statutory forms of convictions and orders—Malicious convictions—Excess of jurisdiction—Warrants of distress and commitment—Quashing of convictions and orders—Removal thereof by certiorari—Proof by affidavit of the circumstances calling for the interference of the superior court—Amendment of orders and convictions—Statement of

a case by way of appeal—Testing the legality of commitments by habeas corpus.

SECTION II.—*Duties and responsibilities of constables and their assistants in the execution of warrants.*—Of the breaking and entering dwelling-houses by constables—Exemption of constables and their assistants from liability for acts done in obedience to a warrant of justices—Excess of authority on the part of constables.

SECTION III.—*Of actions for wrongs done under colour of convictions and warrants of justices.*—Replevin of chattels distrained by warrant of justices—Actions for malicious convictions, commitments, and distresses—Statutory protection to justices from vexatious actions—Setting aside actions—Limitation of actions—Notice of action—Tender of amends—Parties, pleadings, defences, and evidence—Damages recoverable.

SECTION I.

OF TRESPASSES AND INJURIES COMMITTED IN THE EXECUTION OF WARRANTS AND ORDERS OF JUSTICES OF THE PEACE.

Of the jurisdiction and authority of justices of the peace.—The ancient conservators of the peace, the nature and extent of whose power and authority are now unknown, were formerly elected by the freeholders of the county, but since the reign of Edward III. they have been appointed

by the crown. By the stat. 34 Edw. 3, c. 1, it is enacted, that in every county of England there shall be assigned for the keeping of the peace one lord, and with him three or four of the most worthy of the county, with some learned in the law; and they shall have power to restrain offenders, rioters, and all other barrators, and cause them to be imprisoned and duly punished according to the law and customs of the realm; and inform themselves of pillors and robbers who go wandering about and will not labour, and put them in prison, and take of all them that be not of good fame sufficient surety and mainprize of their good behaviour, and duly punish others; and hear and determine, at the king's suit, all manner of felonies and trespasses done in their several counties, according to the laws and customs of the realm. From this statute, therefore, it appears that justices of the peace were to be appointed by commission from the crown; that they were to have authority to hold a court, and were to be judges of a court of record. Courts consequently were holden by them for hearing and determining offences within their cognizance; records were kept by them of their proceedings in these courts, and each justice named in the commission came to be called *custos rotulorum*, or keeper of the records and rolls of the county (*q*).

This power "to hear and determine," gave justices of the peace authority only to hear and determine through the medium of the common-law method of inquisition, before a jury and verdict of a jury, "for that is implied by law, and the court will adjudge as the law appoints, although it be not so expressed" (*r*). Hence, justices were under the necessity of holding sessions and assembling juries for the trial of all offences of which they had cognizance; and these sessions were by 36 Edw. 3, stat. 1, c. 12, commanded to be held at least four times a-year. Special sessions were afterwards directed to be held for executing certain statutes which the justices were charged to execute, and they were enjoined the diligent perusal and study of these statutes at the Easter sessions in every year (*s*).

The power of summary conviction of offenders by justices without the intervention of a jury is entirely the creature of the statute law. No such power is accorded to them by the common law.

"In very early times such a power appears to have been conferred upon them in two cases, which seemed in their nature to require a speedy interference; but even in these it was confined to their own view:" these are the cases of forcible entries, 12 Ric. 2, c. 2, and of riots, 13 Hen. 4, c. 7; in the latter of which, it may be remarked, this extraordinary

(*q*) Holt, C. J., *Harcourt v. Fox*, 1 *land's case*, 4 Co. 74 a, 74 b. Show. 507.

(*s*) 33 Hen. 8, c. 10.

(*r*) See the authorities cited in *Hol*.

jurisdiction is carefully limited by the urgency of the occasion, by which alone, therefore, it was probably thought to be justified: for it is there directed, that if the rioters had departed before the arrival of the justices, so that the view could not be had, they are then to inquire of the matter, not by themselves, but by means of a jury, which they are specially directed in that case to summon. One other instance also occurs of a power to convict without jury, and that was on confession of the party, viz. by the act of 2 Hen. 5, st. 1, c. 4, relating to labourers, which authorized them to examine labourers, &c. on their oath, and on *their confession* to punish them *as if they were convicted by inquest*. These two cases of view and confession seem to be the only clear instances in which justices of the peace were empowered in those early times to inflict punishment upon their own inquiry and judgment."

"The earliest statute upon which a summary conviction by a justice is on record, or of which a precedent is found in the books, is that of 33 Hen. 8, c. 6, against the practice of carrying dags or short guns. Mr. Lambard has given a precedent of a conviction upon this statute (t), and there appears to have been one removed into the Court of Queen's Bench by certiorari as early as the 43d year of Elizabeth, 1600; and this very case affords a proof* of the objection, which, in the state of manners at that day, might well exist against relaxing the jealousy of the common law by intrusting anything like arbitrary authority in private hands" (u).

Until recently justices of the peace had no power to convict summarily for felony, but by 18 & 19 Vict. c. 126, power is given to justices of the peace assembled at petty sessions to hear and determine charges of larceny in a summary way, without the intervention of a jury, where the value of the property stolen does not in the judgment of such justices exceed 5s., and the person charged consents to have the case heard and determined by such justices.

The form of the commission of the peace as it exists at present, is said to have been settled by the judges in the 33d year of Queen Elizabeth's reign (x). It assigns the several persons named in it, and every one of them jointly and severally, the queen's justices, to keep the peace in a particular county, and to cause to be kept all statutes made for the good of the peace and the quiet government of the people; and to punish all who offend against any of the said statutes; and to cause to come before them all who shall threaten any of the people as to their persons, or the burning of their houses, in order to compel them to find surety for the

(t) Lambard's Justice, p. 298. (u) Introduction to Paley on Summary Convictions, pp. 6, 8.

(x) 2 Hawk. P. C. c. 8, § 2.

peace or good behaviour; and if they shall refuse to find such surety, to cause them to be safely kept in prison till they shall find it; also to inquire, upon the oath of good and lawful men of the county, of all felonies, trespasses, and offences, of which justices of the peace may lawfully inquire, &c. (y).

Besides the general authority confided to justices by the commission of the peace, they are clothed by various acts of parliament with a special and particular jurisdiction over particular offences, which jurisdiction must be exercised sometimes by one justice and sometimes by two; sometimes in their sessions, and sometimes out of their sessions. Whenever these statutory powers are exercised by justices, care must be taken that the special authority is strictly pursued.

Every single justice has regularly a jurisdiction for the preservation of the peace through the whole county by virtue of his commission, but the power of hearing and determining offences is by the commission given to two or more; and whenever a thing is required to be done by two justices, they must both be present at the execution of it. A justice has no power to do any judicial act out of his county, but he may do a merely ministerial act, such as the taking of an information (z).

A justice of the peace has jurisdiction to require sureties for good behaviour from persons charged with aggravated defamation, and with persisting in a continued course of libelling. Therefore, where a person persisted in writing libels upon a wall against a private individual, and was required to find sureties for his good behaviour, and in default was committed to prison, it was held that the justice had acted in a matter over which he had jurisdiction (a). If the charge be of an offence over which, if the offence charged be true in fact, the magistrate has jurisdiction, the magistrate's jurisdiction cannot be made to depend upon the truth or falsehood of the facts, or upon the evidence being sufficient or insufficient to establish the *corpus delicti*, nor can the jurisdiction be ever held to depend upon the value or credibility of the evidence (b).

Of ousting the jurisdiction of justices under particular statutes by setting up a claim of title.—Whenever a criminal statute authorizes justices to punish trespasses on land, a wilful intended trespass is intended, and not an entry on land in the *bond fide* assertion of some supposed right or title. Whenever, therefore, in summary proceedings before magistrates, a *bond fide* claim of title to real property, or to the possession of some incorporeal right or privilege over land, is set up before justices by a defendant in

(y) Dalt, J. P. Ch. 5.

M. C. 72.

(z) 2 Hale, P. C. 51.

(b) *Cave v. Mountain*, 1 M. & Gr.(a) *Haylock v. Spark*, 22 Law, J., 262.

answer to some complaint of trespass, the jurisdiction of the justices in the matter is ousted, and the information or complaint ought to be dismissed (c). But the complaint ought not to be dismissed on the strength of the mere assertion of the claim, for it is the duty of the justices to inquire into the circumstances, and ascertain whether there is any plausible or colourable ground for the claim, and whether the act was done in the *bond fide* exercise of what the defendant supposed to be his right in the matter (d). But justices cannot give themselves jurisdiction by erroneously and capriciously deciding contrary to the truth upon the question upon which their jurisdiction depends (e).

The jurisdiction of justices, under the statute 1 & 2 Vict. c. 74, for facilitating the recovery of possession, by landlords, of premises held over by tenants, after the due determination of their tenancy, cannot be ousted by the tenant's setting up the title of some third party, under whom he claims to hold, for as soon as the tenancy is proved to the satisfaction of the justice, the tenant is estopped from disputing the title of his landlord, and no question of title can be raised between them (f).

Exemption of justices from all legal responsibility in respect of things done by them in the exercise of their judicial functions in respect of matters within their jurisdiction.—Justices of the peace are not punishable civilly for acts done by them in their judicial capacities, in respect of matters within their jurisdiction, nor can they be made responsible in damages by reason of the manner in which they have exercised any discretionary power given to them by statute (g). But if they abuse the authority with which they are intrusted, they may be punished by criminal information at the suit of the king. And in cases where they proceed ministerially rather than judicially, if they act corruptly they render themselves liable to an action (h).

Of the liability of justices of the peace for acts done by them without jurisdiction, or in excess of their jurisdiction.—If magistrates, while occupying the bench from which magisterial business is usually administered, publicly hear slanderous complaints over which they have no jurisdiction, and disseminate slanders under the pretence of giving advice, they are no more privileged than if they were illiterate mechanics assembled in an ale-house (i). If a magistrate convicts an accused person of an offence without having any jurisdiction in the matter, and then proceeds to sign

(c) *Reg. v. Cridland*, 7 Ell. & Bl. 967; 27 Law, J., M. C. 28. *R. v. Burnaby*, 2 Ld. Raym. 900.

(d) *Reg. v. Dodson*, 9 Ad. & E. 712. *Morden v. Porter*, 8 W. R. 262. *Reg. v. Cridland*, ut sup.; ante, p. 459.

(e) *Reg. v. Nunneley*, 27 Law, J., M. C. 261.

(f) *Rees v. Davies*, 4 C. B., N. S., 56; ante, p. 459.

(g) 11 & 12 Vict. c. 44, s. 4.

(h) 3 Hawk. P. C. c. 8, s. 74; Bac. Abr. JUSTICE OF THE PEACE, F.

(i) Ld. Campbell, *Lewis v. Levy*, 27 Law, J., Q. B. 242.

and issue a warrant of commitment or distress, under which an imprisonment is effected or goods are seized, the conviction may be removed into the Court of Queen's Bench and quashed (post, p. 520), and an action may then, and not before, be commenced against the magistrate (post, s. 2), to recover damages for the wrong done. Similar proceedings may be taken against him where he has exceeded his jurisdiction, and done more than he was authorized by law to do.

*Exemption of justices from actions and suits in cases where they had a *prima facie* jurisdiction, and no objection was taken to their jurisdiction until after they had adjudicated.*—If, under the special powers of particular acts of parliament, justices have a *prima facie* jurisdiction to inquire into and adjudicate upon certain matters that have been brought before them, and nothing appears, either on one side or the other, to show any want of jurisdiction, they are exempt from liability in respect of their proceedings in the matter (*k*). Where an act of parliament gave certain magistrates a general jurisdiction over disputes between certain friendly societies and their members, excepting where the rules of the society contained an arbitration clause, and certain disputes were brought before a magistrate, who adjudicated thereon in ignorance of the existence of the arbitration clause in the rules of the society, which deprived him of jurisdiction, it was held that he was not responsible for his want of jurisdiction. "When a party," it was observed by the court, "relies on an exception from a general law, the burthen is on him to show that his case falls within the exception; and if the society had produced before the magistrate the clause in their rules enabling them to refer their disputes to arbitration, the magistrate would have had an opportunity of judging whether he had any jurisdiction or not: but they omitted to do this, and the magistrate's attention was never called to the denial of his jurisdiction (*l*).

So, if a person be exempted from serving a particular office and, on being called before a magistrate to show cause why he refuses to do so, if he do not inform the magistrate of the particular ground of his exemption, he cannot maintain an action against the magistrate who orders proceedings to be taken against him in consequence of such refusal (*m*).

In a case that arose on the statute 20 Geo. 2, c. 19, giving magistrates jurisdiction to determine differences between masters and servants in husbandry and other labourers respecting wages, it was held that an action of trespass would not lie against magistrates acting upon a complaint made to them on oath, by the terms of which it appeared that they had jurisdiction, although the real facts of the case might not have supported such com-

(*k*) *Calderv. Halkett*, 3 Moore, P. C. C. 68.

(*l*) *Pike v. Carter*, 10 Moore, 376.
(*m*) *Best, C. J.*, 10 Moore, 386.

plaint, if such facts were not laid before them at the time by the party complained against, he having notice of such complaint, and being duly summoned to attend. "The facts stated in the case," observes Lord Ellenborough, "are not stated as facts appearing before the magistrates at the time and, in order for the plaintiff to avail himself of them, it should have appeared that the same facts were stated to the magistrates before whom he had notice to appear; for how, otherwise, could the magistrates be affected as trespassers, if the facts stated to them upon oath by the complainant were facts whereof they had jurisdiction to inquire, and nothing appeared in answer to contradict the first statement" (n)?

Wrongful proceedings by justices in their own cases, or in matters in which they are themselves personally interested.—A justice of the peace ought never to execute his office in his own case, but cause the offender to be carried before some other justice. "And therefore the Mayor of Hereford was laid by the heels for sitting in judgment where he himself was the complainant, though, by the charter, he was the sole judge of the court" (o). But if a justice of the peace is assaulted, he may commit the offender for trial; or, if he be abused to his face in the execution of his office, he may commit the party until he finds sureties for his good behaviour (p).

If the magistrate himself begins a breach of the peace, he forfeits the protection of the law in the execution of his office (q).

Wrongful commitment and imprisonment by justices.—A magistrate is not at liberty to detain a known person to answer a charge not yet made against him; he ought to have an information regularly before him (post, p. 512), that he may be able to judge whether it charges any offence to which the party ought to answer. It may be otherwise in the case of a mere vagabond, who, if he were once allowed to depart from the presence of the magistrate, would, probably, never be seen again (r).

In an action against a magistrate for an assault and false imprisonment, it appeared that the plaintiff had been summoned, and had appeared before the magistrate to answer a complaint of having unlawfully killed a dog; that the magistrate proposed an arrangement which was rejected by the plaintiff, upon which the magistrate told him that, unless he paid a certain sum of money, he should convict him in a penalty of that amount, and commit him to prison; and then called in a constable, and ordered him to take the plaintiff outside, and if the matter was not settled to bring him in again, when he would proceed to commit him; and the

(n) *Lowther v. Earl Radnor*, 8 East. 113.

(o) Per Holt, C. J., Anon. 1 Salk. 396.

(p) Dalt Just. c. 143. *R. v. Revel*, 1 Str. 420.

(q) *R. v. Symonds*, cas. temp. Hardwicke, 240.

(r) Per Ld. Tenterden, C. J., *Rex v. Birnie*, 1 Mood. & R. 160; 5 C. & P. 206.

plaintiff then went out with the constable and settled the affair by paying a sum of money: it was held that the magistrate was guilty of an assault and false imprisonment, and was responsible in damages, as there was no evidence of any conviction, and he had no right to give the plaintiff into the hands of a constable, in order to drive him into a settlement of the complaint (s).

When constables have arrested a man, and are taking him before a magistrate for the purpose of inquiring into a charge, it is not competent for a magistrate who meets them in the street to order the constables to take the man back to gaol, and keep him in prison. "It is a magistrate's duty," observes Patteson, J., "on all occasions, either to examine into a charge, or, if there is a reason why he cannot examine into it, he is not to interfere at all, and he should let the constable take the party before some other magistrate. It would be a very fearful thing, indeed, if any magistrate is at liberty, meeting a man in custody of the constables in the street, to say, 'Take him back for twenty-four hours, and bring him up to-morrow'" (t).

Of the form of commitment.—A commitment by way of punishment, by word of mouth only, without warrant in writing, cannot be supported (u). The commitment should be in writing, under the hand and seal of the justice by whom it is made, and should set forth his office and authority on the face of it, and the time and place at which it is made; also the cause of the commitment, and the period of the imprisonment. A commitment for an indefinite period cannot be supported (x). It need not be immediately made out, the detention of the party during the time necessarily required to make it out would be justifiable, but it should be made out as soon as possible. A commitment is in no respect like a conviction, which is only an entering on parchment the proceedings of a court which have already taken place, like recording a judgment (y).

Acts of a justice of the peace who has not duly qualified are not absolutely void; and, therefore, persons seizing goods under a warrant of distress, signed by a justice who has not taken the oaths at the general sessions, nor delivered in the certificate required, are not trespassers. Many persons acting as justices of the peace in virtue of offices of corporations, have been ousted of their offices from some defect in their election or appointment; and although all acts, properly corporate and official, done by such persons, are void, yet acts done by them as justices, or in a judicial character, have in no instance been thought invalid (z).

(s) *Bridgett v. Coyney*, 1 M. & R. 215.

(t) *Edwards v. Ferris*, 7 C. & P. 542.

(u) *Mayhew v. Locke*, 7 Taunt. 60.

(x) *Prickett v. Gratrix*, 8 Q. B. 1020.

(y) *Hutchinson v. Lowndes*, 4 B. & Ad.

121. *Leary v. Patrick*, 15 Q. B. 274.

(z) *The Margate Pier Company v. Hannam*, 3 B. & Ald. 271.

Of the commitment by justices of accused persons for trial—Examination of the witnesses.—By 11 & 12 Vict. c. 42, s. 17, it is enacted, that in all cases where any person shall appear or be brought before any justice of the peace charged with any indictable offence, the justice, before he commits the accused person for trial, or admits him to bail, shall, in the presence of such accused person, who is to be at liberty to put questions to any witness produced against him, take the statement on oath or affirmation of those who know the facts and circumstances of the case, and shall put the same into writing, and such depositions shall be read over to, and signed respectively by, the witnesses who shall have been so examined, and also by the justice or justices taking the same, and shall afterwards be delivered (s. 20) to the proper officer of the court in which the trial is to be had, and before the first sitting of the court at which the person committed or bailed is to be tried such person shall be entitled (s. 27) to have, from the officer or person having custody of the same, copies of the depositions on which he shall have been committed or bailed, on payment of a reasonable sum.

Effect of the depositions being taken in the absence of the magistrate who acts upon them.—Every magistrate taking the depositions on oath of the party making the charge has a discretion to exercise; he is to examine the witness, hear his answers, and judge of the manner in which they are given, and to determine in many cases whether bail can or shall be taken. If, therefore, the depositions are taken by the magistrate's clerk in the absence of the magistrate, and the magistrate proceeds to act upon depositions so taken, he acts entirely without jurisdiction: there is no proper charge before him, and if he directs the imprisonment of the person accused by them he is responsible for a trespass (a).

The magistrate is not answerable for the correctness of the charge, or for any erroneous judgment of his own upon the facts. "The only question is, whether the magistrate had jurisdiction to investigate and commit" (b).

Discharge and commitment of prisoners for trial.—By 11 & 12 Vict. c. 42, s. 25, it is enacted, that if a justice, after hearing all the evidence against an accused person, shall be of opinion that it is not sufficient to put him upon his trial for an indictable offence, he shall forthwith order him, if in custody, to be discharged as to the information then under inquiry; but if, in the opinion of the justice, such evidence is sufficient to put the accused upon his trial, or if the evidence given raises a strong or probable presumption of his guilt, then he is, by his warrant, to commit

(a) *Candle v. Seymour*, 1 Q. B. 802.

(b) *Mills v. Collett*, 6 Bing. 92. *Wind-*

ham v. Olevre, Cro. Eliz. 130; 1 Leon. 187.

him to gaol, to be there safely kept until he shall be thence delivered in due course of law, or he is to admit him to bail as thereafter mentioned.

Statutory forms of warrants of commitment are given by 11 & 12 Vict. c. 42, and it is enacted (ss. 9, 10), that no objection shall be taken or allowed to any summons or warrant against a party accused for any defect therein in substance or in form, or for any variance between it and the evidence adduced on the part of the prosecution before the justice who has taken the examination of the witnesses; but if any such variance shall appear to the justice to have deceived or misled the accused, the justice, at the request of the party charged, may adjourn the hearing to some future day, and in the mean time remand the accused, or admit him to bail.

Summary convictions by justices—*Convictions by magistrates on their own view*.—A conviction before a justice or justices of the peace, without the intervention of a jury, is always, as we have seen, under some statute; the common law sanctioning no such proceeding. It is regarded by the courts with no particular favour, and it is necessary that the justice should, on the record of it, show that he has proceeded recto ordine (c). In some cases, and under particular acts of parliament, a summary remedy is provided, as we have seen, for particular offences, by enabling a magistrate to convict and punish upon his own view of the commission of the offence, without making any inquiry upon oath or taking any information (d). The record of the proceedings in such cases need only set forth such circumstances as were necessary to give the magistrate jurisdiction, and show that he pursued the directions of the statute (e).

Summary convictions founded upon informations.—When the magistrate has not been authorized by statute to act upon his own view, he must have some information or complaint before him in order to give him jurisdiction in the matter. He may have jurisdiction over the offence in the abstract; but to give him jurisdiction in any particular case over a particular individual, there must be a proper charge or information before him (f). If, therefore, he grants a warrant against a person upon a supposed charge of felony, without taking any deposition or information on oath, and the party is arrested under the warrant, this is a trespass, for which an action may forthwith be maintained against such justice for compensation in damages (g). So if he makes an order for the removal of a pauper, without having before him a complaint by the parish officers of

(c) 1 Smith's L. C., note to *Crepps v. Durden*.

(d) *Jones v. Owen*, 2 D. & R. 602.

(e) *Rasten v. Carew*, 3 B. & C. 640.

(f) *Candle v. Seymour*, 1 Q. B. 892.

(g) *Morgan v. Hughes*, 2 T. R. 225.

the chargeability of such pauper to the removing pariah, he acts wholly without jurisdiction in the matter, and is a trespasser (A).

If the depositions on oath of the party making the charge are taken by the magistrate's clerk in the absence of the magistrate, and the magistrate convicts upon depositions so taken, he acts, as we have seen (ante, p. 511), entirely without jurisdiction, as there is no proper charge or complaint before him.

Magistrates have no jurisdiction to convict summarily, and impose a fine for an assault, when it is an established fact that a complainant before them does not complain of the assault, and does not intend to give them jurisdiction to deal with it. Therefore, where a person who had been assaulted went before magistrates to bind over the assaulting party to keep the peace, and the magistrates, finding that an assault had been committed, proceeded to deal with the assault by summary conviction, notwithstanding a protest by the complainant against their deciding on the assault, it was held that the justices had acted without any jurisdiction in the matter, the assault not having been brought before them with a view to their adjudicating upon it, and a rule for a certiorari (post, p. 526) to remove and quash the conviction was made absolute, in order that the conviction might be no bar to ulterior proceedings by indictment or by action (i).

Requisites of the information or complaint.—By the stat. 11 & 12 Vict. c. 43, s. 8, it is enacted, that in all cases of complaints upon which a justice of the peace may make an order for the payment of money or otherwise, it shall not be necessary for the complaint to be in writing, unless it shall be required to be so by some particular act of parliament upon which it is framed; and (s. 10) that every complaint upon which a justice of the peace is authorized by law to make an order, and every information for any offence or act punishable upon summary conviction, unless some particular act of parliament shall otherwise require, may be made or laid without any oath or affirmation being made of the truth thereof, except in cases of informations, where the justice receiving the same shall thereupon issue his warrant in the first instance to apprehend the defendant; and in every such case the matter of such information shall be substantiated by the oath or affirmation of the informant, or by some witness on his behalf, before any warrant shall be issued.

Every such complaint must be for one matter of complaint only, and every such information for one offence only, and every complaint or information may be laid or made by the complainant or informant in person, or

(A) *Reg. v. Just. Bucks*, 3 Q. B. 807.

(i) *Reg. v. Dwyer*, 20 Law, J., M. C. 189; 2 L. M. & P. 230.

by his counsel or attorney, or other person authorized in that behalf. Provision is made (s. 4) for describing in the information or complaint, partners, joint-tenants, parceners, or tenants-in-common, and their property; also the ownership of works and buildings maintained or repaired at the expense of any county, riding, division, &c., and of any materials for making, altering, or repairing the same, or repairing highways and turn-pike-roads; also the ownership of goods provided by parish-officers for the use of the poor, and the property of Commissioners of Sewers.

When a warrant is intended to be issued on the strength of the information, the information must, in order to give the justice jurisdiction in the matter, disclose a complaint about something or other that the justice has authority to inquire into and adjudicate upon, and the facts necessary to show jurisdiction must be substantiated on oath. An information on oath laid before a magistrate, charging an offence within his cognizance, is sufficient to give the magistrate jurisdiction over the charge and the person charged, although the information does not disclose any legal evidence of the guilt of the prisoner, and states nothing beyond mere hearsay, upon which neither judges nor juries could properly act. The commitment by the magistrate of a party to gaol upon the strength of such an information amounts at the utmost to no more than an error in judgment on the part of the magistrate, for which a magistrate, if acting within his jurisdiction, is not liable (*k*).

Of the time within which the information or complaint must be laid.—By 11 & 12 Vict. c. 43, s. 11, it is enacted, that in all cases where no time is specially limited for making any complaint or laying any information, the complaint or information shall be laid within six calendar months from the time when the matter of such complaint or information arose. This limitation as to time being entirely distinct from the enactment creating the offence, and there being a *prima facie* jurisdiction, until it is shown that the period of limitation had expired at the time of the laying of the information, the limitation need not be noticed, and it need not be shown on the face of the proceedings that they had been originated within the appointed period. "All that is matter of defence, and need not be noticed in the conviction" (*l*).

Proceedings by justices upon information or complaint.—By the stat. 11 & 12 Vict. c. 43, s. 1, it is enacted, that where an information shall be laid before one or more justices of the peace, that any person has committed, or is suspected to have committed, any offence or act within the jurisdiction of such justice or justices, for which he is liable upon summary conviction to be imprisoned or fined, or otherwise punished; and

(*k*) *Cave v. Mountain*, 1 M. & Gr. 257.

(*l*) *Wray v. Toke*, 12 Q. B. 507.

also where a complaint shall be made to any such justice or justices, upon which he or they have authority by law to make any order for the payment of money or otherwise, it shall be lawful for such justice, &c., to issue a summons directed to such person, stating, shortly, the matter of such information or complaint, and requiring him to appear at a certain time and place to answer the information and complaint. Provision is made for the service of such summons and proof of the service thereof, and (s. 2) for the issue of a warrant for the apprehension of the party summoned in case of his non-appearance, according to the exigency of the summons.

By s. 2, power is given to such justices, upon oath or affirmation being made before them substantiating the matter of such information, to issue, in the first instance, a warrant for apprehending the person against whom the information has been laid, and bringing him up to answer thereto, and to be dealt with according to law.

Warrants for the apprehension or commitment of witnesses for non-attendance, or refusing to be sworn or to give evidence.—By 11 & 12 Vict. c. 42, s. 16, and 11 & 12 Vict. c. 43, s. 7, it is further enacted, that if it shall be made to appear to any justice, by the oath or affirmation of a credible person, that any one within the jurisdiction of the justice is likely to give material evidence, and will not voluntarily appear to be examined, such justice is authorized and required to issue his summons to such person in a form specified, requiring him to appear and give evidence at an appointed time and place; and if the person summoned neglects to appear, and no just excuse is offered for his non-appearance, then, after proof on oath or affirmation of service of the summons as therein mentioned, and that a reasonable sum was paid or tendered to the witness for his costs and expenses, it shall be lawful for the justice to issue a warrant to bring up such person to be examined; or if the justice shall be satisfied, by evidence upon oath or affirmation, that it is probable that such person will not attend to give evidence without being compelled to do so, then, instead of issuing a summons, it shall be lawful for the justice to issue his warrant in the first instance; and if, on the appearance of such person, either in obedience to a summons or in custody on the warrant, he shall refuse to be examined on oath or affirmation, or to give evidence, without offering any just excuse for his refusal, any justice of the peace then present, and having there jurisdiction, may by warrant commit the person so refusing to the common gaol or house of correction for any time not exceeding seven days, unless he shall in the meantime consent to be examined and to answer concerning the premises.

Of the hearing of complaints and informations.—By 11 & 12 Vict. c. 43, s. 12, it is further enacted, that every complaint and information shall be heard and determined by one or more justice or justices, as shall be directed

by the act of parliament upon which the complaint or information shall be framed; and if there be no direction in any act of parliament, then the complaint may be heard and determined by one justice for the county, riding, division, liberty, city, borough, or place, where the matter of the information shall have arisen.

Also (s. 2), that where a party summoned has failed to appear in obedience to the summons, it shall be lawful for such justice or justices, on proof upon oath of the due service of the summons, to proceed *ex parte* to the hearing of such information or complaint, and to adjudicate thereon; or the justice, &c. may (s. 13), upon the non-appearance of the defendant, issue a warrant for his apprehension, and adjourn the hearing to a future day. If the complainant himself does not appear in person, or by counsel or attorney, the complaint or information must be dismissed or the hearing adjourned. If the defendant, being personally present before the justice, admits the truth of the information or complaint (s. 14), and shows no sufficient cause why he should not be convicted or an order made against him, then the justice or justices present at the hearing are to convict him or make an order: but if he do not admit the truth of the information or complaint, then the hearing and examination of the prosecutor or the complainant and his witnesses are to be proceeded with in the manner therein provided.

Every prosecutor of an information, not having any pecuniary interest in the result, and every complainant in any such complaint, whatever his interest may be in the result of the same, is a competent witness (s. 15) to support the information or complaint. And it is provided (s. 14), that if the information or complaint in any such case shall negative any exemption, exception, proviso, or condition in the statute on which the same shall be framed, it shall not be necessary for the prosecutor or complainant to prove such negative, but the defendant may prove the affirmative thereof in his defence if he would have advantage of the same.

Where the statute creating the offence directs the issue of a summons, and gives the party summoned a certain time to appear and plead, there will be a clear want of jurisdiction if the justices proceed to hear the complaint before the expiration of the full period allowed (m).

Mistakes in the information—Variances between the statements contained in the information and the evidence adduced in support thereof.—It is further enacted (11 & 12 Vict. c. 43, s. 9), that any variance between the information and the evidence adduced in support thereof, as to the time of the commission of the offence, shall not be deemed material, if it be proved that the information was in fact laid within the time limited by law for

(m) *Mitchell v. Foster*, 12 Ad. & E. 475.

laying the same; and any variance between the information and the evidence adduced in support thereof, as to the parish or township in which the offence is alleged to have been committed, shall not be deemed material, provided that the offence be proved to have been committed within the jurisdiction of the justice by whom the information shall be heard and determined; and if any variance between the information and the evidence shall appear to the justice or justices⁽ⁿ⁾ present and acting at the hearing to be such that the party charged by the information has been thereby deceived or misled, it shall be lawful for the justice to adjourn the hearing of the case, and in the meantime commit the defendant to prison, or discharge him upon his entering into a recognizance for his appearance at the adjourned hearing. If a person is summoned before a magistrate, and appears to answer the charge stated in the summons, he cannot be lawfully convicted on a totally different charge; nor, if the evidence fails to substantiate the particular charge specified in the summons, can the summons be altered or amended so as to alter the nature of the offence originally charged, and to answer which the party has appeared (n).

Of the drawing up of convictions and orders.—By 11 & 12 Vict. c. 43, s. 14, it is further enacted, that if the justice or justices convict or make an order against the defendant, a minute or memorandum thereof shall then be made, and the conviction or order shall afterwards be drawn up in proper form, and lodged with the clerk of the peace, to be filed among the records of the general quarter sessions of the peace. The conviction may be drawn up in form at a future time, after it has been acted upon, and may then be exhibited to authenticate the proceeding and protect the magistrate (o). The commitment and conviction do not connect themselves together. A magistrate cannot justify a commitment for one offence by a conviction for another and different offence (p).

Of the disclosure of the jurisdiction of justices, and of the authority by which they act on the face of their proceedings.—"In the case of special authorities given by statute to justices or others acting out of the ordinary course of the common law, the instruments by which they act, whether warrants to arrest, commitments, or orders, or convictions or inquisitions, ought, according to the course of the decisions, to show their authority on the face of them, by direct averment or reasonable intendment. Not so the process of the superior courts, acting by the authority of the common law" (q). Every order of justices, therefore, should show

(n) *Martin v. Pridgeon*, 28 Law, J.,
M. C. 179; 33 Law, T. R., 110.

(o) *Massey v. Johnston*, 12 East. 81.

(p) *Rogers v. Jones*, 3 B. & C. 412.

Martin v. Pridgeon, ut sup.

(q) Per Cur. *Gosset v. Howard*, 10 Q. B.
453.

on the face of it a complaint and an adjudication thereon (*r*). "I think," observes Coleridge, J., "that the rule is a good rule, and that it is right that the jurisdiction of a judge with limited powers should be shown upon the face of his proceedings; and if this is not done, it would not be known that the matter was not *coram non judice*, and it is not fitting that jurisdiction should be established one way or the other by parol evidence" (*s*).

The justices cannot give themselves jurisdiction in a particular case, by finding that as a fact which is not a fact (*t*), and capriciously deciding, contrary to the truth, upon the question upon which their jurisdiction depends (*u*).

Description of the offence or subject-matter of complaint.—The nature of the offence concerning which the justice is to inquire and determine must be correctly stated, in order to show that the justice has jurisdiction over it. It should be described in the words of the statute creating it (*x*), and care must be taken not to misdescribe it. Where an act of parliament made the wilful misapplication of parish money by a relieving officer a penal offence, to be inquired into and adjudicated upon by justices, and the information charged merely a misapplication of the parish money, not saying that it was wilful, it was held that it did not charge any offence cognizable by the justices, and that the conviction founded upon it could not be supported (*y*). And where an act of parliament made it a penal offence, cognizable by justices, to expose to sale metal buttons marked gilt, "knowing the same not to be gilt with gold or plated with silver," and the information charged the act to have been done fraudulently and unlawfully, without saying "*knowingly*," it was held that there was no offence charged of which the justices had authority to take cognizance (*z*).

A description in the conviction of the offence, in the terms of the act creating it, where it appears from the whole tenor and scope of the act that more is necessary to be proved by the evidence in order to constitute the offence than is stated in express terms upon the face of the statute, is not a sufficient description (*a*). Where a statute enacted "that no conviction on this act shall be set aside by any court for want of form, or through the mistake of any fact, circumstance, or other matter whatsoever, provided the material facts alleged in such conviction, and upon which the same shall be grounded, be proved to the satisfaction of the

(*r*) *Labalmidiere v Frost*, 5 Jur. N. S., Q. B., 780. *Lindsay v Leigh*, 11 Q. B. 465.

(*s*) *Reg. v. St. George, Bloomsbury*, 24 Law, J., M. C. 49.

(*t*) *Welsh v. Nash*, 8 East. 404.

(*u*) *Reg. v. Nunnsley*, 27 Law, J., M. C.

261.

(*x*) *Rez v. Speed*, 1 Ld. Raym. 583. *Ex parte Smith*, 27 Law, J., M. C. 186.

(*y*) *Carpenter v. Mason*, 12 Ad. & E. 630.

(*z*) *Rez v. Jukes*, 8 T. R. 586.

(*a*) *Fletcher v. Calthrop*, 6 Q. B. 880.

court," Lord Kenyon declared that he could understand the enactment so far as it regarded the proceedings before courts of quarter sessions on appeal, but not as applied to proceedings removed into the Court of King's Bench. "On an appeal," observes his lordship, "the whole case is to be gone into; evidence is to be given to support the conviction, and then it may be known whether or not the material facts alleged in such conviction, and upon which the same shall be grounded, be proved to the satisfaction of *that court*: but when the conviction is removed here by certiorari, I do not understand how we can inquire into those facts. The great question here is, whether or not the material facts to constitute the offence be alleged in the conviction" (b).

Of singling out the offender.—Although it is sufficient, in describing an offence in a conviction, to follow out the words of the act creating the offence, yet it is always necessary to add such facts as show that the person convicted was a party to that offence so described (c). The conviction must single out the offender, and specify him by name, and therefore a conviction of "Harrison and Company" is a nullity, even against the party named. "We cannot tell upon the face of such a proceeding whether the delinquency of Harrison's partners who are not before the court may not have been imputed to him" (d). If the conviction convicts the offender of one or other of two offences in the alternative, it is bad (e).

Description of the locality of the offence.—It is a general rule, that all judicial acts exercised by persons whose judicial authority is limited as to locality must appear to be done within the locality to which the authority is limited. Justices, therefore, acting judicially, must appear to be acting *in* their jurisdiction, as well as *for* it; and those cases which seem at first sight to afford some ground for a different opinion, will be found on examination to be all cases in which the act done might be valid, though done in point of fact out of the jurisdiction (f). It is not sufficient to describe the justices as justices *in* the county, nor as justices *for* the county; but if they are described as doing the act as "justices in and for the county," that will suffice. "For," observes Williams, J., describes the authority, "in" the place in which the justices were when they made the order (g).

In convictions, the place for which the magistrates act must be shown, the offence must be set out, and either it must appear that the offence

(b) *Rex v. Jukes*, 8 T. R. 540.

(c) *Chaney v. Payne*, 1 Q. B. 731.

(d) Per Cur. *Rex v. Harrison & Co.*, 8 T. R. 508.

(e) *Rex v. Morley*, 1 Y. & J. 221. *Rex*

v. North, 6 D. & R. 146.

(f) *Reg. v. Totness*, 11 Q. B. 90. *Reg.*

v. Crowan, 14 ib. 221.

(g) *Reg. v. Stockton*, 7 Q. B. 527.

was committed within the limits for which the convicting magistrates are appointed, or facts must be stated which give them jurisdiction beyond those limits (*h*). It is not sufficient to affirm that the offence was committed within a locality over which they had jurisdiction as justices, without naming it (*i*). Where justices followed a form of conviction prescribed by statute, which did not set forth the place where the offence was committed, it was nevertheless held that the conviction was bad for not showing that the offence was committed at some place within the county of which they were justices (*k*). It is not in all cases sufficient, therefore, to follow a form given by statute (*l*).

Where a statute directs an act to be done by justices acting for the division, any justice within the county acting within the division is for this purpose a justice of the division (*m*).

Orders and adjudications by justices must show upon the face of them that the justice had jurisdiction to make the order. "However high the authority may be where a special statutory power is exercised, the person who acts must take care to bring himself within the terms of the statute. Whether the order be made by the Lord Chancellor or by a justice of the peace, the facts which gave the authority must be stated" (*n*). An order of justices under 11 Geo. 2, c. 19, s. 4, adjudging a party to pay double the value of goods fraudulently removed to prevent a distress, must show on the face of it that the party removing the goods was the tenant, and that the complainant was his landlord, or the bailiff, agent, or servant of such landlord, as otherwise it is not made to appear that the magistrates had any jurisdiction to make the order (*o*). There must be a distinct finding on the face of the order by the magistrates of all the facts necessary to constitute the offence, and give the justices authority to deal with it (*p*). An order of Justices, therefore, was quashed because it did not appear on the face of it that they were justices of the county or for the county, but only that they were residing in the county (*q*).

The mention of the name of the county in the margin of the instrument only proves that it was made by the justices for that county, but does not show that the act to which it relates was committed in the county (*r*); nor does it show that the justices were acting within the county at the time they made the order (*s*), unless the marginal note of

(*h*) *Kite and Lane's case*, 1 B. & C. 104. *Rex v. Edwards*, 1 East. 279. *R. v. Chandler*, 14 ib. 274.

(*i*) *Rex v. Johnson*, 1 Str. 261.

(*k*) *Rex v. Hazell*, 18 East. 141.

(*l*) *Re Peerless*, 1 Q. B. 152.

(*m*) *R. v. Price*, Cald. 305.

(*n*) *Coleridge, J., Christie v. Unwin*, 11

Ad. & E. 379.

(*o*) *Rex v. Davis*, 5 B. & Ad. 554.

(*p*) *Day v. King*, 5 Ad. & E. 366.

(*q*) *Rex v. Dobbins*, 2 Salk. 474.

(*r*) *Rex v. Austin*, 8 Mod. 310.

(*s*) *Reg. v. St. George, Bloomsbury*, 24 Law, J., M. C. 49.

the county is incorporated into the body of the order by words of reference, and the whole when read together shows upon the face of it that the justices making the order were justices of or for the county, and that they made it in the county. Where an order of justices was headed "Westmoreland to wit," and the justices were described in the body of the order as justices of the peace "in and for the said county," it was held that this could mean no other county than the county stated in the margin; that the reference to it made it part of the order, and that it sufficiently appeared that the order was made in the county by justices for the county (*t*). But where one county was named in the margin of the order and another in the body of it, and the justices omitted to state of which county they were justices, it was held that the jurisdiction was not shown, and that the order was bad (*u*). It is not sufficient to place the name of a county or of a borough in the margin of the order, and state in the body of it that the order is made by justices having jurisdiction within and for the said county or borough, without stating or showing that the order itself was made by them within the county or the borough for which they were justices (*x*).

If a conviction and order, and adjudication thereupon made, are so worded as to impose a larger obligation than is imposed by the statute authorizing them, the conviction and order cannot be supported. A conviction, therefore, of several defendants, making each of them liable to be imprisoned until he has paid a penalty, and the costs and expenses of conveying not only himself but the other persons convicted to gaol, will be bad unless the statute on which the conviction is founded expressly renders all the defendants liable to be imprisoned until the costs of conveying all to gaol have been paid (*y*).

Statutory forms of convictions and orders.—By 11 & 12 Vict. c. 43, s. 17, it is enacted, that in all cases of conviction, where no particular form of conviction is given by the statute creating the offence, and where an order is made and no particular form of order is given by the statute giving authority to make the order, and in all cases of convictions upon and orders made under statutes before then passed, whether any particular form of conviction or order has been therein given or not, it shall be lawful for the justice to draw up his conviction or order in such one of the forms of conviction or order in the schedule to the act as shall be applicable to the case, or in a form to the like effect. And by s. 32 it is

(*t*) *Reg. v. Casterton*, 6 Q. B. 512.

(*u*) *Rex v. Moon, Critchell*, 2 East.

(*x*) *Reg. v. Newton Ferrers*, 9 Q. B. 32.

(*y*) *Reg. v. Cridland*, 27 Law, J., M. C.

enacted, that the several forms in the schedule to the act, or forms to the like effect, shall be deemed good, valid, and sufficient in law.

These forms begin with a marginal note of the county; and they record that on a certain day and year *within* the said county the offending party was convicted before the undersigned justices of the peace *for* the said county; they state the nature of the offence, the time and place when and where it was committed, and the adjudication and order thereupon made. In stating the offence, care must be taken to show that the offence or act is within the cognizance or jurisdiction of the justice who makes the conviction or order, and that the offence created by the statute upon which the proceedings are founded has been committed (*z*). In following the form of order given by the statute, or in framing an order to the like effect, care must be taken to show that the conviction or order was made *in* the county named in the margin of the instrument, as well as by a justice of the peace *for* the county (*ante*, p. 520).

The forms given by these statutes dispense with the necessity of setting out the information, the summoning of the defendant, the fact of his appearance or non-appearance, the evidence adduced against him, and the various details previously considered necessary to show that the magistrates proceeded *recto ordine* (*a*). "If justices substantially adopt the forms given by the statute, they do all that is required of them. If this were not so, the act itself would only prove a snare to entrap persons" (*b*).

Immateriality of mere surplusage.—If proceedings before magistrates correctly describe the offence, and show when and where it was committed, and that the magistrate had jurisdiction over it, and over the individual charged with it, and contain all that is prescribed by statute to make them valid, they are not rendered invalid because they set out the information, the summons, the defendant's appearance, the examinations of the witnesses, and a host of particulars which are not now required to be stated or set forth on the face of the proceedings. Where a particular form is required by statute, and the form actually used contains all that the statute requires, and a great deal more, the unnecessary addition does not necessarily invalidate the proceedings (*c*). But it will do so if the unnecessary addition renders the order or instrument substantially different from what is required by the statute (*d*).

Effect of the conviction.—So long as the conviction remains in force, it cannot be contradicted, nor the facts recorded therein be controverted (*e*);

(*z*) *Reg. v. Johnson*, 8 Q. B. 106.

(*a*) *Wray v. Toke*, 12 Q. B. 4-2.

(*b*) *Allison in re*, 10 Exch. 568.

(*c*) *Rex v. Jefferies*, 4 T. R. 769.

(*d*) *Rex v. Priest*, 4 T. R. 538.

(*e*) *Strickland v. Ward*, 7 T. R. 633 n.

and it is a principle of law, that where justices of the peace have an authority given them by an act of parliament, and they appear to have acted within the jurisdiction so given, and to have done all that they are required by the act to do to originate their jurisdiction, a conviction drawn up in due form and remaining in force is a protection in any action brought against them for the act so done (*f*). And now, although the magistrate had no jurisdiction in the matter, and had no legal authority to make the conviction or order, the conviction is nevertheless conclusive, and protects him from an action until it has been quashed.

Malicious convictions by magistrates.—So long as a magistrate is acting in a judicial capacity in a matter regularly before him, and over which he has jurisdiction, he is not responsible for a wrongful conviction, with whatever malicious feelings he may have been actuated in the matter, unless the conviction has been quashed (*g*). But if a magistrate makes libellous charges and imputations upon parties in respect of matters not regularly before him, and in respect of which he is not authorized to express an opinion in a judicial capacity, he is clothed with the same responsibility as any other private publisher or disseminator of slander (*ante*, p. 507).

Convictions by justices in excess of their jurisdiction.—Where the nature of the offence is such that it can only be committed once on the same day by the same person, and the magistrate proceeds to hear and convict, he is *functus officio*, and has no power to entertain or adjudicate upon a charge of a second offence on the same day by the same person. Thus, where a magistrate convicted a baker in four separate penalties for exercising his ordinary calling by baking rolls on a Sunday, and there were four separate convictions for selling four rolls, upon which the magistrate issued four distress warrants, it was held that the magistrate, after he had convicted the baker in the first penalty, had no jurisdiction to convict him again for the same offence on the same day. "The act of parliament," observes Lord Mansfield, "gives authority to the justice to punish a man for exercising his ordinary calling on a Sunday. The justice exercises his jurisdiction by convicting him in the penalty for so doing. But then he has proceeded to convict him for three other similar offences on the same day. Now, if there are four convictions for one and the same offence, committed on one and the same day, three of them must necessarily be bad" (*h*).

Warrants of distress and commitment.—By the stat. 11 & 12 Vict. c. 43, s. 19, it is enacted, that where a conviction adjudges a pecuniary penalty, to be paid, or where an order requires the payment of money, and by

(*f*) *Easton v. Carew*, 3 B. & C. 653.

J., M. C. 78.

(*g*) Post, s. 3. *Gelan v. Hall*, 27 Law,

(*h*) *Orepps v. Durden*, Cowp. 645.

the statute authorizing the conviction or order such penalty, compensation, or sum of money is to be levied upon the goods and chattels of the defendant by distress and sale thereof, and also in cases where, by the statute in that behalf, no mode of levying the penalty, compensation, &c., is provided, it shall be lawful for the justice, &c., making the conviction or order, or for any justice of the peace for the same county, riding, division, &c., to issue a distress warrant for the levying of the same in the mode therein provided, or, in case the defendant has no sufficient goods and chattels, to issue (s. 21) a warrant of commitment. And it is enacted (s. 20), that in all cases where a justice of the peace shall issue any such warrant of distress it shall be lawful for him to suffer the defendant to go at large, or verbally, or by a written warrant in that behalf, to order the defendant to be kept and detained in safe custody until return shall be made to such warrant of distress, unless such defendant shall give sufficient security, by recognizance or otherwise, to the satisfaction of such justice, for his appearance before him at the time and place appointed for the return of such warrant of distress, or before such other justices of the county, &c.

"It is to be remembered," observes Coleridge, J., "that such an imprisonment is not a part of the punishment under the conviction, but is a mere detention until the return of the warrant, in case there should be no distress. It is a power to imprison quia timet, extra the punishment, and such a power should be strictly pursued. Now, assuming that magistrates, acting in the exercise of that power, have detained a party by parol commitment for an indefinite time (the warrant of distress not being returnable on a day certain), there is an excess of jurisdiction" (i). In all cases of commitment of parties to prison, the exact period of imprisonment must be stated on the face of the warrant, for "if it is left indefinite, a man may be imprisoned for life" (k).

It is further enacted (s. 22), that in all cases of convictions where the statute on which the same are founded provides no remedy, in case it shall be returned to a warrant of distress thereon, that no sufficient goods can be found, it shall be lawful for the justice to whom such return is made, or to any other justice of the peace for the same county, &c., by his warrant to commit the defendant for any term not exceeding three calendar months, unless the sum adjudged to be paid, and all costs and charges of the distress, &c. (the amount thereof being ascertained and stated in such commitment), shall be sooner paid. And by s. 23 it is enacted, that in all cases where the statute authorizing a conviction for a penalty or compensation, or an order for the payment of money, makes no provision for

(i) *Leary v. Patrick*, 15 Q. B. 274.

(k) *Ld. Denman, C. J., Prickett v. Gratvez*, 8 Q. B. 1029.

the levying thereof by distress, but directs the imprisonment of the defendant in case of non-payment; such penalty, &c., shall not be levied by distress, but a warrant of commitment may issue for the imprisonment of the defendant for such time as the statute on which the conviction or order is founded shall direct, unless the money, with costs, &c., is sooner paid. Provision is also made (s. 24) for the issue of a warrant of commitment for a certain time, when the order is not for the payment of money but for the doing of some act which the defendant refuses to do: also for the levying of costs by warrant of distress where, by the conviction or order, a certain sum is adjudged to be paid by the defendant to the complainant for costs, and for the commitment of the defendant in default of distress, for any time not exceeding one calendar month.

Where an imprisonment, warrant of justices, and seizure of goods thereunder, are all defended on the ground that there was an adjudication to pay costs, and there is no such adjudication, the warrant is illegal, and the imprisonment and seizure of the goods are wrongful, and an excess of jurisdiction (1).

Of the exemption of justices from actions in respect of warrants of distress for poor-rate.—By the stat. 11 & 12 Vict. c. 44, s. 4, it is further enacted, that where any poor-rate shall be made, allowed, and published, and a warrant of distress shall issue against the person named and rated therein, no action shall be brought against the justice who shall have granted such warrant by reason of any irregularity or defect in the rate, or by reason of such person not being liable to be rated therein.

Warrants of distress and commitment in case of non-payment of costs by the informer or complainant, on the dismissal of an information or complaint.—By 11 & 12 Vict. c. 43, s. 25, it is enacted, that where any information or complaint is dismissed with costs, the sum awarded for costs may be levied by distress on the goods of the prosecutor or complainant; and, in default of distress or payment, such prosecutor or complainant may be committed to prison for any time not exceeding one calendar month, unless such sum, and all costs and charges of the distress, and of the commitment, and conveying of such prosecutor or complainant to prison (the amount thereof being ascertained and stated in the commitment), shall be sooner paid.

Service of a copy of the minute of the order before the issue of a warrant of commitment or distress.—It is further enacted (11 & 12 Vict. c. 43, s. 17), that in all cases where by act of parliament authority is given to commit a person to prison, or to levy upon his goods or chattels by distress, for not obeying any order of justices, the defendant shall be served with a copy of the minute of such order before any warrant of commitment or of distress

(1) *Leary v. Patrick*, 15 Q. B. 274.

shall issue, and such order or minute shall not form any part of such warrant of commitment or of distress. Wherever the interest of a party is to be affected by an order of magistrates, he ought to have an opportunity of contesting it (*m*).

*Of the quashing of convictions and orders on appeal to the Court of Queen's Bench—Removal of orders and convictions by certiorari (n).—*The proceedings of all inferior courts of record are removable by certiorari, for the purpose of being examined by the Court of Queen's Bench, except where the writ of certiorari is expressly taken away by statute (*o*); and even then the writ is not taken away, as we shall presently see, in those cases where inferior courts or magistrates have acted in a matter over which they had no jurisdiction, nor in cases where they have exceeded their jurisdiction, nor is it taken away by express prohibitory words when it is moved for on behalf of the crown. Where an order of justices confirming a conviction is void, on the ground of interest in the justices who made the order, the Court of Queen's Bench will grant a certiorari to bring up the order for the purpose of quashing it; and if the order was made by a court of quarter sessions on appeal from justices in petty sessions, the Court of Queen's Bench will grant a mandamus to compel the quarter sessions to enter continuances, and again hear the appeal (*p*).

Decisions which are final, and cannot be reviewed on appeal.—By 12 & 13 Vict. c. 45, it is enacted, that the decisions of courts of quarter sessions upon the hearing of any appeal, as to the sufficiency of the statement of any ground of appeal, and as to the amending, or refusing to amend, any order or judgment of justices appealed against, or the statement of any ground of appeal, and as to the substitution of new recognizances, shall be final, and not liable to be reviewed in any court by means of a writ of certiorari or mandamus, or otherwise.

When the writ of certiorari is not taken away by express statutory prohibition.—The writ of certiorari is not taken away by express prohibitory or restraining clauses in cases where justices of the peace have acted without jurisdiction (*q*), or where the decision has been made by a court improperly constituted, as where magistrates have acted in the execution of their office in matters and proceedings in which they were personally interested (*r*), or where it can be shown that the conviction has been

(*m*) *Reg. v. Totness Un.*, 7 Q. B. 699.
Painter v. Liv. Gas Co. 3 Ad. & E. 443.

(*n*) Chitt. Arch. Pr. CERTIORARI.

(*o*) *Groenvelt v. Burwell*, 1 Ld. Raym. 469.
R. v. Moreley, 2 Burr. 1041.

(*p*) *Hopkins ex parte*, 4 Jur. N. S., Q. B., 529.

(*q*) *Rez v. Derb. Just.*, 2 Ken. 299.
Reg. v. War. Just., 6 Ell. & Bl. 887.
Reg. v. Badger, ib. 154. *Reg. v. St. Albans*, 22 Law, J. M. C. 142.

(*r*) *Reg. v. Cheltenham*, 1 Q. B. 474.
Reg. v. Aberdare Canal Co., 14 ib. 854.

obtained by fraud and collusion to defeat the law, or interfere with the pure administration of justice; for in all cases where the proceedings of courts of inferior jurisdiction are shown to have been a fraud and mockery, or the result of conspiracy and subornation of perjury, the court will exercise its jurisdiction as a court of control over inferior jurisdictions, and will interfere by certiorari and quash the proceedings, although it is expressly enacted that no certiorari shall be issued to remove them (s): "for fraud is an extrinsic collateral act, which vitiates the most solemn proceedings of courts of justice." Lord Coke says, "It avoids all judicial acts, ecclesiastical or temporal," and therefore the sentence of a spiritual court may be annulled by proving the same to have been obtained by fraud or collusion (t).

If a local board exceeds their powers in making a by-law, and a justice convicts upon the strength of it, he exceeds his authority in so doing, and the conviction may be quashed on certiorari, although the statute authorizing the creation of the board and the making of the by-laws enacts that no proceeding touching the conviction of any offender shall be removable by certiorari; and the allowance of the by-law by the Secretary of State makes no difference, "for no power is given to him to legislate; he can only confer an authority on a by-law made conformably to the statute authorizing it to be made" (u).

"It is a known rule," further observes Bayley, J., "that general words in an act that no certiorari shall be allowed, or the like, will not bind the crown" (x), nor any private person prosecuting on behalf of the crown (y), for the king's prerogative cannot be taken away by act of parliament except by express words, and it is part of his prerogative to try his cause in what court he pleases (z).

Proof by affidavit of the facts and circumstances calling for the interference of the superior court.—Although the proceedings before justices are all regular on the face of them, and disclose a case within the jurisdiction of the magistrates, yet the parties on either side may bring before the superior court affidavits disclosing on the part of the magistrates the evidence on which they acted, and on the part of the defendant the evidence on which he relied before them, as well as other evidence affecting the merits not adduced before them, for the purpose of showing that the case was not within the jurisdiction of the magistrates. The superior court has no power to review the decision on the merits, and to reverse it on the ground that it was unwise or unjust. All that it can do is to see

(s) *Reg. v. Gillyard*, 12 Q. B. 527.

(t) *Duchess of Kingston's case*, 2 Smith's L. C. 808.

(u) *Reg. v. Wood*, 5 Ell. & Bl. 55.

(x) *Rex v. Allen*, 15 East. 342. *Rex v. Davies*, 5 T. R. 626.

(y) *Reg. v. Spencer*, 9 Ad. & F. 486.

(z) *Rex v. Berkley*, 1 Ken. 100.

that the case was within the jurisdiction of the magistrates who adjudicated upon it, and that their proceedings are on the face of them regular, and according to law.

"Magistrates," observes the court, "cannot, as it is often said, give themselves jurisdiction merely by their own affirmation of it (a). But it is obvious that this may have two senses: in the one it is true; in the other, on sound principle and on the best-considered authority, it will be found untrue. Where the charge laid before the magistrate does not amount in law to the offence over which the statute gives him jurisdiction, his finding the party guilty, by his conviction in the very terms of the statute, would not avail to give him jurisdiction. If the charge being really insufficient, the magistrate has misstated it in drawing up the proceedings, so that they appear to be regular, it would be clearly competent to the defendant to show by affidavits what the real charge was, and that appearing to be insufficient, we should quash the conviction. Wherever a charge has been presented to the magistrate over which he had no jurisdiction, he had no right to entertain the question, or commence an inquiry into the merits, and his proceeding to a conclusion will not give him jurisdiction. But as in this latter case we cannot get at the want of jurisdiction but by affidavits, of necessity we must receive them. But where a charge has been well laid before a magistrate, on its face bringing itself within his jurisdiction, he is bound to commence the inquiry. In so doing he undoubtedly acts within his jurisdiction; but in the course of the inquiry, evidence being offered for and against the charge, the proper, or, it may be, the irresistible conclusion to be drawn, may be that the offence has not been committed, and so that the case in one sense was not within the jurisdiction. Now to receive affidavits for the purpose of showing this is clearly in effect to show that the magistrate's decision was wrong if he affirms the charge, and not to show that he acted without jurisdiction; for they would admit that, in every stage of the inquiry up to the conclusion, he could not but have proceeded, and that if he had come to a different conclusion his judgment of acquittal would have been a binding judgment, and barred another proceeding for the same offence. Upon principle, therefore, affidavits cannot be received under such circumstances. The question of jurisdiction does not depend on the truth or falsehood of the charge, but upon its nature; it is determinable on the commencement, not at the conclusion, of the inquiry; and affidavits, to be receivable, must be directed to what appears at the former stage, and not to the fact disclosed in the progress of the inquiry" (b).

(a) *Welsh v. Nash*, 8 East. 404.

Penny in re, 7 Ell. & Bl. 660: 26 Law,

(b) *The Queen v. Bolton*, 1 Q. B. 72. J., Q. B. 225.

If justices have proceeded to remove a pauper without any complaint by parish officers of the chargeability of such pauper, the fact may be shown by affidavit; for if there is no complaint, the magistrates have nothing before them in respect of which they can make an order, or exercise their magisterial functions (c).

Amendment of orders or judgments of justices on return to a certiorari.—By 12 & 18 Vict. c. 45, s. 7, it is enacted, that if upon the return to any writ of certiorari any objection shall be made, on account of any omission or mistake in the drawing up of an order or judgment of justices, and it shall be shown to the satisfaction of the court that sufficient grounds were in proof before the justices making such order, or giving such judgment, to have authorized the drawing up thereof free from the said omission or mistake, it shall be lawful for the court, upon such terms as to payment of costs as it shall think fit, to amend such order or judgment, and to adjudicate thereupon as if no such omission or mistake had existed; but no such objection is to be allowed unless the omission or mistake has been specified in the rule for issuing such certiorari (d). If, therefore, on the face of an order, the justices making it are not described as justices “in and for” the borough in which the order is made, or there is any other defect in point of form, the court will amend the defect without payment of costs on either side (e).

Of the execution of convictions and orders after notice of appeal.—Some statutes giving an appeal against summary convictions expressly stay execution pending the appeal (f). From the 27th section of the statute 11 & 12 Vict. c. 43, it may be argued that, pending an appeal, justices are not at liberty to grant a warrant in execution, as they are expressly authorized to grant the warrant after the appeal is determined. But sect. 35 enacts that the act shall not extend to any complaints, orders, or warrants in matters of bastardy, with certain exceptions. The pendency of an appeal, therefore, against an order on a putative father, and the granting of a case for the opinion of the Court of Queen's Bench, as to whether the order ought to be enforced, does not take away the jurisdiction of justices to issue a warrant in execution of the conviction, and enforce payment of the money due under the order in the interim; for if the putative father could, as a matter of right, entirely escape all liability to contribute to the maintenance of the child pending the appeal, he might for three months allow the child to starve and oppress the mother, although he never meant *bond fide* to prosecute the appeal. “In a vast

(c) *Reg. v. Justices of Bucks*, 3 Q. B. 807.

(d) *Reg. v. Higham*, 26 Law, J., M. C. 118.

(e) *Reg. v. Hellingley*, 26 Law, J. M. C. 167; 7 W. R. Q. B. 413.

(f) *Reg. v. Aston*, 1 L. M. & P. 491.

majority of cases, however," observes Lord Campbell, "it would be exceedingly improper in the justice to grant a warrant after notice of appeal had been given and recognizances entered into, and before the hearing of the appeal, or before the time for hearing it, has expired. And, acting from a corrupt motive, he might be liable to an action for maliciously granting it. But I do not think that in granting it he could be said to have acted without jurisdiction, and possibly he might show that he had acted laudably in granting it. It might, on the other hand, be highly improper for the justice to try to enforce the order when the justices at quarter sessions had expressed a grave doubt as to its validity, and his doing so might be evidence of malice" (g).

Exemption of justices from liability where a defective conviction or order has been confirmed upon appeal.—By the stat. 11 & 12 Vict. c. 44, s. 6, it is enacted, that in all cases where a warrant of distress or warrant of commitment shall be granted by a justice of the peace upon any conviction or order, which either before or after the granting of such warrant shall be confirmed upon appeal, no action shall be brought against the justice who granted the warrant for anything which may have been done under the same by reason of any defect in such conviction or order.

Statement of a case to the superior courts by way of appeal from decisions of justices.—By 20 & 21 Vict. c. 43, it is enacted, that after the hearing and determination by justices of any information or complaint which they have power to hear and determine in a summary way, either party to the proceeding may, if dissatisfied with the determination as being erroneous in point of law, apply in writing within three days to the justices to state and sign a case, setting forth the facts and grounds of such determination, for the opinion thereon of one of the superior courts of law, to be named by the party applying. Notice of writing, with a copy of the case stated and signed, is to be given to the other party to the proceedings, and security is to be given by the appellant (s. 3) to prosecute the appeal without delay, and to pay such costs as may be awarded. If the justices refuse to state a case (s. 4), the appellant may apply (s. 5) to the Court of Queen's Bench, upon an affidavit for a rule calling upon the justices and the respondent to show cause why the case should not be stated; and if the rule is made absolute, the case is to be stated on the appellant's entering into the required recognizances.

Power is given to the superior courts to hear and determine cases sent up to them under this statute, and reverse, affirm, or amend the decision of the justices below, or send the case back (s. 7) for amendment, and make all necessary orders in the matter. The authority and jurisdiction

(g) *Kendall v. Wilkinson*, 4 Ell. & Bl. 690; 24 Law, J., M. C. 89.

of the superior courts in the matter may (s. 8) be exercised by a judge at chambers, and after the decision of the superior court has been given the order is to be enforced in the mode pointed out by the statute (h).

Of testing the legality of a commitment by writ of habeas corpus.—The legality of an imprisonment under a warrant of commitment may be brought under the consideration of the superior courts, or a judge in chamber, by writ of habeas corpus, which may be sued out either in term or vacation. It is directed to the gaoler in whose custody the prisoner is detained, directing him to bring up the body of such prisoner before the court or judge, together with the cause of his being taken and detained (i). Where a prisoner has been lodged in gaol under a bad warrant of commitment in execution of a conviction, a good warrant of commitment subsequently made out and delivered to the gaoler, but before a rule for a habeas corpus has been obtained, is a good answer to that rule (k).

The validity of the commitment may be tried on moving for a rule to show cause why a writ of habeas corpus should not issue, and why, in the event of the rule being made absolute, the prisoner should not be discharged; without the writ actually issuing, or the prisoner being personally brought before the court (l). On moving for a writ of habeas corpus, the conviction may be brought before the court, verified by affidavit, for the purpose of defeating the magistrate's commitment; but in such case the commissioner, before whom the affidavit is sworn, ought to certify on the exhibit annexed that it is the document referred to in the affidavit (m). Although a return to a writ of habeas corpus may be good on the face of it, it may be shown that the conviction and commitment, under which the prisoner is detained, were substantially a civil proceeding, and that the arrest took place on a Sunday (n).

Upon a return to a habeas corpus affidavits are not admissible to show that the offence was not committed within the jurisdiction of the committing justice (o).

When a prisoner is entitled to his discharge from custody as a matter of right, the court has no power to impose any terms upon him as the condition of his release, and will not make his discharge from custody dependent upon his undertaking to bring no action against those who have unlawfully caused him to be imprisoned (p).

(h) *Reg. v. Dickenson*, 3 Jur. N. S. 1070.

(i) 2 Chitt. Arch. Pr. 1240. Fry's HABEAS CORPUS, (*Canadian Prisoner's case*).

(k) *Ex parte Cross*, 26 Law, J., M. C. 201. *Reg. v. Richards*, 5 Q. B. 932. *Ex parte Smith*, 27 Law, J., M. C. 186.

(l) *Eggington's case*, 2 Ell. & Bl. 731.

(m) *Allison in re*, 10 Exch. 561.

(n) *Eggington's case*, 2 Ell. & Bl. 717. *Swan v. Dakins*, 16 C. B. 93.

(o) *Ex parte Smith*, 27 Law, J., M. C. 186.

(p) *Downey's case*, 7 Q. B. 281.

Of proceedings against justices to compel them to act in particular cases, and for determining the legality of the acts they are required to perform.— By the stat. 11 & 12 Vict. c. 44, s. 2, reciting that it would conduce to the advancement of justice and render more effective and certain the performance of the duties of justices, and give them protection in the performance of the same, if some simple means, not attended with much expense, were devised, by which the legality of any act to be done by such justices might be considered and adjudged by a court of competent jurisdiction, and such justice enabled and directed to perform it without risk of any action or other proceeding being brought against him, it is enacted, that in all cases where a justice of the peace shall refuse to do any act relating to the duties of his office as such justice (*q*), it shall be lawful for the party requiring such act to be done to apply to the Court of Queen's Bench, upon an affidavit of the facts, for a rule calling upon such justice, and also the party to be affected by such act, to show cause why such act should not be done; and if, after due service of such rule, good cause shall not be shown against it, the said court may make the same absolute, with or without, or upon payment of costs, as to them shall seem meet; and the justice, upon being served with such rule absolute, is to obey the same and do the act required; and no action or proceeding whatsoever is to be commenced or prosecuted against such justice for having obeyed the rule and done the act thereby required (*r*).

Before the court will make an order under this section of the statute, it must be satisfied that the act sought to be enforced would be a lawful act. Where a rule was obtained calling upon justices to show cause why they should not issue a distress warrant to enforce an order made by them, and it appeared that the order was invalid, and that the issuing and execution of a distress warrant upon it would be an act of trespass, the court discharged the rule (*s*).

The court will not try a doubtful question of title on application for an order under this section. "It would be very awkward," observes Patteson, J., "if the new statute had the effect of bringing all questions of title before us upon affidavit" (*t*).

(*q*) As to what is a refusal, see *R. v. Paynter*, 20 Law, J., M. C. 102.

(*r*) *Reg. v. Mainwaring*, 1 Ell. Bl. &

Ell. 474.

(*s*) *Reg. v. Collins*, 21 Law, J., M. C. 73.

(*t*) *Reg. v. Browne*, 19 Q. B. 654.

SECTION II.

OF THE DUTIES AND RESPONSIBILITIES OF CONSTABLES* AND THEIR ASSISTANTS
IN AND ABOUT THE EXECUTION OF WARRANTS AND ORDERS OF MAGIS-
TRATES.

Of the breaking and entering a dwelling-house in execution of a warrant.—

In every case where the outer door of a dwelling may be lawfully broken open in order to make an arrest or to execute civil process, the officer must, as we have seen, first give due notice of his business, and must have demanded and have been refused admission. "Where a felony hath been committed, or a dangerous wound given, or even where a minister of justice comes armed with process founded on a breach of the peace, the party's own house is no sanctuary for him; doors may, in any of these cases, be forced; the notification, demand, and refusal before mentioned having been previously made. In these cases, the principles of political justice conspire to supersede every pretence of private inconvenience, and oblige us to regard the dwellings of malefactors, when shut against the demand of public justice, as no better than the dens of thieves and murderers, and to treat them accordingly. But bare suspicion touching the guilt of the party will not warrant a proceeding to this extremity, though a felony has been actually committed, unless the officer comes armed with a warrant from a magistrate grounded on such suspicion" (u).

Exemption of constables and persons acting in their aid from liability for acts done by them in obedience to a warrant of justices.—By 24 Geo. 2, c. 44, s. 6, it is enacted, that no action shall be brought against any constable or other officer, or against any person acting by his order or in his aid, for anything done in obedience to any warrant under the hand and seal of any justice, until demand has been made or left at his usual place of abode by the party intending to bring the action, or his attorney or agent, in writing, signed by the party demanding the same (x), of the perusal and copy of such warrant, and the same hath been refused or neglected for the space of six days after demand. And in case after demand and compliance therewith any action shall be brought against such constable or person acting in his aid, without making the justice a defendant, the jury shall, on production and proof of the warrant at the trial, give their verdict for the defendant, notwithstanding any defect of jurisdiction in such justice.

(u) Sir Michael Foster's *Discourse of Homicide*, p. 319.

(x) *Clark v. Woods*, 2 Exch. 405.

And if the action is brought jointly against the justice and constable, then, on proof of the warrant, the jury shall find for such constable, notwithstanding such defect of jurisdiction.

The officer, therefore, has the period of six days after the demand of his authority for the production of it; within which time, if he comply with the demand, he secures his indemnity. But if he delay after that time, he subjects himself to be sued as any other person. If, however, after the six days have expired, but before the issue of a writ, he complies with the demand, he is still entitled to the protection of the statute (*y*). This statute is confined to actions of tort (*z*), and the officer, in order to be entitled to the protection, must show that in doing what he did he acted in obedience to the warrant; for if he exceeds his authority, or acts without a warrant, or arrests a party not named in the warrant, he is not entitled to the benefit of the statute (*a*).

If the warrant is directed to be executed within the limits of a particular county, and the officer by mistake executes it beyond the prescribed limits, he has not acted in obedience to the warrant, and is not entitled to the statutory protection (*b*). Neither can he claim the benefit of this 6th section of the statute in cases where, when acting under a search-warrant, he has seized and carried away articles not mentioned in the warrant, and not in anywise connected therewith (*c*); nor when, under a warrant to apprehend A, or to seize the goods of A, he apprehends B, or takes the goods of B (*d*); nor if he exceeds the authority given him by the warrant and commits any excess, such as remaining longer in a dwelling-house than he was legally authorized to remain, or breaking open doors and windows which he was not authorized to break open (*e*). But wherever the officer has acted in obedience to the warrant, he secures his indemnity by complying with the requirements of the statute, although the warrant may be illegal or improper, or may have been granted by a magistrate who had no jurisdiction or power to grant it (*f*). If the officer loses the protection of the statute, he must justify under the justice's warrant (*g*).

By the stat. 11 & 12 Vict. c. 43, s. 19, constables are authorized to execute warrants out of their districts, provided they are executed within the jurisdiction of the justice granting or backing the same. But the

(*y*) *Jones v. Vaughan*, 5 East. 447.

(*z*) *Irving v. Wilson*, 4 T. R. 485.

(*a*) *Bell v. Oakley*, 2 M. & S. 259.
Postlethwaite v. Gibson, 3 Esp. 226.

(*b*) *Milton v. Green*, 5 East. 298.

(*c*) *Crozier v. Cundey*, 6 B. & C. 232.

(*d*) *Money v. Leach*, 3 Burr. 1768.
Kay v. Grover, 7 Bing. 312; 5 M. & P.

145. *Hoye v. Bush*, 1 M. & Gr. 775; 2 Sc. N. R. 92.

(*e*) *Peppercorn v. Hofman*, 9 M. & W. 628. *Bell v. Oakley*, 2 M. & S. 259.

(*f*) *Atkins v. Kilby*, 11 Ad. & E. 784.
Price v. Messenger, 2 B. & P. 158.

(*g*) *Read v. Coker*, 13 C. B. 859.

constable is not bound to execute a warrant out of his district (*h*). A warrant of distress for rates directed to two persons for execution, may be executed by one of them alone (*i*).

Excess of authority on the part of constables and officers—Handcuffing unconvicted prisoners.—A constable or peace-officer has no right to handcuff an unconvicted prisoner unless he has attempted to escape, or except it be necessary in order to prevent his escaping. "Such a degree of violence and restraint," observes Bayley, J., "upon the person cannot be justified, even by a constable, unless he makes it appear that there are good special reasons for his resorting to it" (*k*).

Arrest by private individuals acting in aid of a constable.—All persons called by a police constable to his assistance may, as we have seen, whilst acting in aid of the constable, arrest and detain all such offenders as the constable himself is authorized to arrest and detain (*ante*, p. 413).

SECTION III.

OF ACTIONS FOR WRONGS DONE UNDER COLOUR OF CONVICTIONS AND WARRANTS OF JUSTICES.

Replevin of chattels distrained under warrant of justices.—"Though in ordinary practice," observes Parke, B., "the remedy by replevin is applied only to a distress for rent, yet it is at common law applicable in all cases where goods are improperly taken (*l*); and I find no satisfactory authority to show that it will not lie where goods are improperly taken under a warrant of a justice of the peace. In some cases, no doubt, the court will interfere to prevent a replevin, to save its process from being defeated. The rule is correctly stated in Chief Baron Gilbert's treatise on Replevin, p. 138, where it is said, 'If a superior court award an execution, it seems that no replevin lies for goods taken by the sheriff by virtue of the execution, and if any person shall pretend to take out a replevin and execute it, the court would commit them for contempt for attempting to defeat the execution,

(*h*) *Gimbert v. Coyney*, 1 M'Clel. & Y. 469.

(*i*) *Lee v. Vessey*, 25 Law, J., Exch. 271.

(*k*) *Wright v. Court*, 6 D. & R. 625; 4 B. & C. 590. *Griffin v. Coleman*, 4 H. & N. 265; 28 Law, J., Exch. 134.

(*l*) *Mellor v. Leather*, 1 Ell. & Bl. 610.

and would punish the sheriff by attachment.' But Chief Baron Gilbert also says, 'that in cases in which the court has no jurisdiction, the goods may be replevied.' If, therefore, goods have been seized under a justice's warrant, and the justice had no jurisdiction to make the warrant, the goods so seized may be replevied" (m). "It is true," further observes Alderson, B., "that replevin will not lie for goods seized under the judgment of a superior court; for if you replevied on the first judgment, you could do so on the judgment upon that also, and so there would be replevin on replevin *ad infinitum*. It is different in the case of an inferior jurisdiction, which is to be set right by the superior" (n).

Of actions of tort against justices of the peace. — By the stat. 11 & 12 Vict. c. 44, s. 1, it is enacted, that every action thereafter against a justice of the peace, for any act done by him in the execution of his duty, with respect to any matter within his jurisdiction, shall be an action on the case as for a tort, and in the declaration of the cause of action it shall be expressly alleged and proved at the trial that the act was done maliciously and without reasonable and probable cause; but (s. 2) that for any act done by a justice of the peace in a matter of which by law he has not jurisdiction, or in which he shall have exceeded his jurisdiction, any person injured thereby, or by any act done under any conviction or order made or warrant issued by such justice in any such matter, may maintain an action against such justice as before the passing of the act, without proving that the act was done maliciously, and without reasonable and probable cause: but it is provided that no such action shall be brought for anything done under such conviction or order, until after the conviction shall have been quashed, either upon appeal or upon application to the Court of Queen's Bench: nor shall any such action be brought for anything done under any warrant which shall have been issued by such justice to procure the appearance of a party before him, and which shall have been followed by a conviction or order in the same matter, until after the conviction or order shall have been quashed; or if such last-mentioned warrant shall not have been followed by any such conviction or order, or if it be a warrant upon an information for an alleged indictable offence; nevertheless, if a summons was issued previously to such warrant, and served upon the party, either personally or by leaving the same for him with some person at his last or most usual place of abode, and he did not appear according to the exigency of the summons (o), in such case no action shall be maintained against such justice for anything done under such warrant.

(m) *George v. Chambers*, 11 M. & W. 150. *Morrell v. Martin*, 3 M. & Gr. 590. Parke, B., *Jones v. Johnson*, 5 Exch. 875.

(n) *Ib.* 161. As to proceedings in

Replevin, see ante, pp. 376-379.

(o) An appearance by counsel or attorney is a sufficient appearance. *Bessell v. Wilson*, 1 Ell. & Bl. 496.

The second section of this statute is confined to cases in which the act by which the plaintiff is injured is in itself an act in excess of jurisdiction. Thus, where an information was laid before a justice, upon which he convicted and awarded a penalty and costs, and ordered them to be levied by distress, and so far pursued his jurisdiction, but he then exceeded it, by adding an alternative that the plaintiff should be put in the stocks in case the penalty and costs were not paid or raised by distress, and the plaintiff's goods were seized under a distress, but the plaintiff was not put in the stocks, and the conviction was afterwards quashed, and an action was brought against the justice for the distress, it was held, that the justice was entitled to the protection afforded by the first section of the statute. "It cannot be doubted," it was observed, "that the justice had jurisdiction in everything except the alternative order, and the action is brought, not for putting the plaintiff in the stocks under it, but for doing that which the defendant might have justified if he had drawn up his conviction in proper form. The construction of sect. 2 of the statute must be so controlled by sect. 1 as to be consistent with it; and that is done by so construing sect. 2 as to confine its application to cases in which the cause of action arises from the excess of jurisdiction, as it would have done in this case, if the plaintiff had been put in the stocks, and had brought his action for that" (p).

Actions for malicious convictions, commitments, and distresses, and the malicious abuse by magistrates of the functions of their office.—The first step to be taken to enable an aggrieved party to recover damages from a magistrate for a malicious conviction and malicious abuse of the functions of his office is, as we have seen, to get the conviction quashed, and that being done, it will be necessary, if the magistrate had jurisdiction in the matter, to show that he acted maliciously, and without reasonable and probable cause (q). When the magistrate had no jurisdiction in the matter, and the conviction has been quashed, the magistrate may be proceeded against, and is responsible for his acts, just the same as any private person. If he has slandered the plaintiff, he will be responsible in damages in an action for slander (ante, p. 507), and if he has signed and issued a warrant of commitment or distress, under which the plaintiff has been imprisoned or distrained upon, he will be responsible in an action for false imprisonment (ante, ch. xi.), or a wrongful seizure and conversion of the plaintiff's goods (ante, p. 183), without any proof of malice on the part of the magistrate, or of the want of reasonable and probable cause for his wrongful acts.

Actions against justices in the county court—Effect of objections by justices

(p) Per Coleridge & Cresswell, Js.
Barton v. Bricknell, 13 Q. B. 393; 20
 Law, J., M. C. 1.

(q) *Gelan v. Hall*, 27 Law, J., M. C.
 78. *Burley v. Bethune*, 5 Taunt. 583.

to such actions.—In all actions against justices of the peace in the county court, the action must be brought in the court within the district in which the act complained of was committed; but no action can be brought in any county court against a justice of the peace for anything done by him in the execution of his office, if such justice shall object thereto (r). Where a justice of the peace, who had been sued in the county court for an act done by him in the execution of his office, gave notice that he objected to being sued in the county court, and afterwards applied for and obtained a writ of certiorari to remove the cause from the county court into the Court of Exchequer, it was held that his notice terminated the proceedings in the county court altogether, and that the suit could not be revived in the superior court (s).

Of setting aside certain actions brought against justices of the peace.—Provision is made by the stat. 11 & 12 Vict. c. 44, s. 7, for setting aside proceedings in certain actions against justices of the peace, brought in defiance of the provisions (ante, pp. 536, 537) of that statute.

Of the limitation of actions against justices of the peace.—By the stat. 11 & 12 Vict. c. 44, s. 8, it is enacted, that no action shall be brought against any justice of the peace for anything done by him in the execution of his office, unless the same be commenced within six calendar months after the act complained of has been committed. The period of limitation runs from the termination, not from the commencement, of the wrongful act. Therefore, when a party has been wrongfully imprisoned under an illegal commitment, the time of limitation will run from the period of the termination of the imprisonment, and not from the time of the making out of the warrant of commitment (t). And where goods have been sold under an illegal warrant of distress, the time of limitation will run from the period of the sale of the goods, and not from the time of the original seizure. The seizure is not made absolutely in the first instance, but with a view only to the detention of the goods until the amount ordered to be levied should be paid, and their subsequent sale if it should not be paid, so that the seizure and sale form part of one continued grievance, which distinguishes it from cases where the seizure was for a forfeiture (u).

Where an action is intended to be brought against a justice of the peace for a wrongful imprisonment, under a conviction or order of commitment which the justice had no jurisdiction to make, the time of limitation will run from the time of the making of the conviction or order, and not

(r) 11 & 12 Vict. c. 44, s. 11.

(s) *Weston v. Sneyd*, 1 Hurl. & Norm. 703; 26 Law. J., Exch. 161.

(t) *Massey v. Johnson*, 12 East. 67.

Hardy v. Ryle, 9 B. & C. 807. *Violet v. Symson*, 8 Ell. & Bl. 348.

(u) *Collins v. Rose*, 5 M. & W. 202.

from the time of the quashing thereof. The quashing of the conviction is only a condition to the prosecution of the action, like the delivery of an attorney's bill, or the giving a notice of action (x).

Of notice of action against justices.—By the stat. 11 & 12 Vict. c. 44, s. 9, it is enacted, that no action shall be commenced against any justice of the peace for anything done by him in the execution of his office, until one calendar month at least after a notice in writing of such intended action shall have been delivered to him, or left at his usual place of abode, by the party intending to commence such action, or by his attorney or agent; in which notice the cause of action, and the court in which the same is intended to be brought, shall be clearly and explicitly stated, and upon the back thereof shall be indorsed the name and place of abode of the party intending to sue, and also of the attorney or agent, when the notice is served by an attorney or agent (y).

Statutory clauses for the protection of magistrates in the execution of the duties of their office, appear always to have been construed on the principle that where the magistrate, with some colour of reason and *bona fide*, believes that he is acting in pursuance of his lawful authority, he is entitled to protection, although he may proceed illegally or exceed his jurisdiction (z). And where he acts in his magisterial capacity maliciously, and without *bona fides*, he is also entitled to the statutory protective preliminaries to an action, and to an opportunity of tendering amends. A magistrate may act maliciously (post, s. 2), and yet may have reasonable and probable cause for his acts. So he may be in the execution of his duty although he may act maliciously; and in all cases where the substance of the complaint is that he has abused his power as a magistrate, he is entitled to notice of action (a). The question as to whether the magistrate was acting in the execution of his office, is a question at the trial for the judge, and not for determination by a jury (a).

Wherever the magistrate has authority to act upon the subject-matter of the complaint brought before him, he must be considered to have acted by virtue of his office, although the place where the offence was committed was not within his jurisdiction (b). In a case where one magistrate acted alone in a matter which required the concurrence of two, it was held that he was acting in execution of his office, and was entitled to notice of action (c).

Wherever, also, the magistrate, in what he did, intended to act in the

(x) *Haylock v. Sparke*, 22 Law, J., M. C. 67, 71.

(y) As to notice of action, see ante, pp. 411-415.

(z) *Hazeldine v. Grove*, 3 Q. B. 1006; ante, pp. 411, 412.

(a) *Kirby v. Simpson*, 23 Law, J., M. C. 165.

(b) *Prestidge v. Woodman*, 1 B. & C. 12; 2 D. & R. 45.

(c) *Weller v. Tuke*, 9 East. 363.

execution of some special power or authority conferred by a statute requiring notice of action to be given, notice of action must be given to the magistrate; although, in point of fact, he was not acting under the statute, and had no power to do what he has done (*ante*, pp. 411, 412).

A person who intends to sue a justice of the peace for an act done by him in a matter respecting which he had no jurisdiction, must not wait for the quashing of the conviction or order of commitment before giving the notice of action. The notice of action may be given as soon as the wrongful act has been committed, though the action itself cannot be commenced until after the conviction or commitment has been quashed (*d*). If in the case of a conviction the magistrate receives notice of action before the conviction is quashed, he may at his peril rely upon the validity of the conviction, and abstain from tendering amends; but if he does so, and the conviction is quashed, the action may be commenced against him one calendar month after service of the notice (*e*).

Of the statement of the cause of action on the face of the notice.—The nature of the cause of action, or of the complaint or grievance, should be explicitly stated on the face of the notice, so as to show whether the plaintiff proceeds against the magistrate for an act done by him maliciously, and without reasonable and probable cause, in the execution of his duty as a justice, with respect to some matter within his jurisdiction, within the first section of 11 & 12 Vict. c. 44, or for an act done by him in a matter over which he had no jurisdiction, or respecting which he had exceeded his jurisdiction within the second section of that statute. If the notice fails clearly and explicitly to point out the nature of the cause of action, so as to show whether it is governed by the first or the second section of the statute, it will be a bad notice (*f*). “But the notice,” justly observes Abbott, C. J., “ought not to be construed with great strictness, its object being merely to inform the defendant substantially of the ground of complaint, but not of the mode or manner in which the injury has been sustained” (*g*). The time and place of the doing the act complained of ought also to be stated in the notice. “I do not go so far,” observes Lord Denman, “as to say that a party will always be strictly bound to prove the time and place which he names in his notice, but I think the words of the statute require that a time and place for the occurrence be named” (*h*).^{*}

Tender of amends before action.—By 11 & 12 Vict. c. 44, s. 11, it is

(*d*) *Haylock v. Sparke*, 22 Law, J., M. C. 67; *ib.* Q. B. 156.

(*e*) *Ib.* 67.

(*f*) *Taylor v. Nesfield*, 8 Ell. & Bl. 724; 28 Law, J., M. C. 160.

(*g*) *Prickett v. Gratreux*, 8 Q. B. 1020. *Jones v. Bird*, 5 B. & Ald. 844. *Jacklin v. Fytche*, 14 M. & W. 387.

(*h*) *Martins v. Upcher*, 8 Q. B. 668.

further enacted, that after notice of action has been given to a justice, and before the action shall be commenced, the justice to whom such notice shall be given may tender to the party complaining, or to his attorney or agent, such sum of money as he may think fit, as amends for the injury complained of in such notice; and if the jury at the trial shall be of opinion that the plaintiff is not entitled to damages beyond the sum so tendered, then they shall give a verdict for the defendant, and the plaintiff shall not be at liberty to elect to be nonsuited.

Whether the preliminary matters required by statute for the protection of magistrates have been duly complied with appears to be a question for the decision of the judge at the trial, and not for determination by a jury (i).

Of the computation of the month's notice, and of the time for tendering amends.—The general rule is, that when time for a particular period is allowed to a party to do any act, the day from which the computation is to be made is to be reckoned exclusively. And whenever a certain space of time is given to a party to do some act, which space of time is included between two other acts to be done by another person, "both the days of doing those acts ought," observes Alderson, B., "to be excluded, in order to insure to him the whole of that space of time." Thus, where a month's notice of action is required to be given to a justice of the peace before an action can be commenced against him, and the justice is to have the whole of that month for tendering amends, both the day of the giving of the notice and the day of the tendering amends are to be excluded from the computation of the time; for, wherever the act of parliament allows a party an intervening period of a month, within which to deliberate whether he will tender amends or not, unless you exclude both the first and the last day, you do not give him a whole month for that purpose (k).

Of the statutory protection to constables, officers, and their assistants, from vexatious actions.—We have already seen that actions against constables, their deputies and assistants, for anything done by them by virtue of their offices, or in the execution of an act of parliament, must be brought and tried within a certain limited period in the county where the cause of action arose; that notice of action must be given; that tender of amends may be made before action; that the general issue may be pleaded, and the act of parliament under which the constable intended to act, and the special matter, may be given in evidence under that plea (ante, pp. 409–415). Where, therefore, a constable is acting *bond fide*, and with an

(i) Parke, B., *Kirby v. Simpson*, 10 Exch. 366. *Arnold v. Hamel*, ib. 366.

(k) Alderson, B., *Young v. Higgon*, 6 M. & W. 54.

honest opinion that he is discharging his duty, and that he is acting at the time in obedience to the warrant of a magistrate, he is entitled to the statutory protection, although he is altogether mistaken in the proceeding he has adopted, and had in truth no warrant or authority for what he has done. If, for example, an officer meaning *bond fide* to act under a warrant, by mistake arrests the wrong person, or seizes the goods of the wrong party, and so does an act which the warrant did not order him to do, and for which he had consequently no authority, he is, nevertheless, if he acted *bond fide*, entitled to the benefit of the protecting clause, limiting the time for the bringing of an action against him for the trespass (l).

Various acts of parliament clothing justices of the peace, constables, and officers with special powers and authorities in particular cases, limit the time for bringing actions against them for anything done in pursuance of such statutes to three, or six, or twelve months, and the object of these statutes clearly is, as we have already seen, to protect persons acting illegally, but in supposed pursuance, and with a *bond fide* intention of discharging their duty, under the act of parliament (m).

Parties to be made defendants in actions for wrongs done under colour of a warrant of justices — *Wrongful convictions and orders made by one justice and acted upon by another justice.*— By 11 & 12 Vict. c. 44, s. 3, it is enacted, that where a conviction or order shall be made by one justice, and a warrant of distress or of commitment shall be granted thereon by some other justice of the peace, *bond fide* and without collusion, no action shall be brought against the latter by reason of any defect in such conviction or order, or for any want of jurisdiction in the justice who made the same; but the action, if maintainable, is to be brought against the justice or justices who made the conviction or order.

Liability of parties who set justices and constables in motion.— A person who merely lays a cause of complaint before a magistrate in a matter over which the magistrate has a general jurisdiction, and the magistrate grants a warrant, upon which the party charged is arrested, the party laying the complaint is not responsible for an assault and false imprisonment, although the particular case be one in which the magistrate had no authority to act (n). But if the proceeding is founded in malice, or if the complainant accompanies the constable charged with the execution of the warrant, and points out the party to be arrested under it, he may render himself liable either to an action for a malicious prosecution,

(l) *Parton v. Williams*, 3 B. & Ald. 395. *Smith v. Wiltshire*, 5 Moore, 322; ante, pp. 411, 412.

(m) *Theobald v. Crichmore*, 1 B. & Ald. 229; ante, pp. 411, 412.

(n) *Carrall v. Morley*, 1 Q. B. 28.

or to an action for false imprisonment (*o*). If a private party intervenes between the magistrate and the constable, and busies himself in executing the justice's warrant, and the proceedings should be set aside, he may render himself responsible in damages for the consequences of his interference (*p*). Where the defendant having accused the plaintiff of embezzlement, both parties agreed to go before a magistrate to settle the matter, and the defendant, addressing the magistrate, said he came to prefer a charge of embezzlement against the plaintiff, whereupon the plaintiff was ordered to go into the dock, and was detained in custody until the charge had been heard and dismissed, it was held that the defendant was not responsible for the imprisonment, which was an act done by the magistrate in the exercise of his authority (*q*).

All persons called by a police-constable to his assistance may, as we have seen, whilst acting in aid of the constable, arrest and detain all such offenders as the constable himself is authorized to arrest and detain; but if a private individual, not being called upon by a constable to aid and assist him in the execution of his duty, and not acting under the command and authority of the constable, officiously interferes and gives false information to the constable and wrong directions, and thereby causes a wrongful arrest, he is, as we have seen (*ante*, pp. 416, 417), responsible for the wrongful imprisonment brought about by his instrumentality. The same consequences follow if, by his officious intermeddling, he causes the goods of the wrong person to be seized under a distress warrant (*ante*, pp. 488, 489).

Of the declaration of the cause of action—Venue.—We have already seen, that in every action against a justice of the peace the venue must be laid in the county where the act complained of was committed, and that the same rule applies in the case of actions against constables and officers in respect of things done by them by virtue of their offices (*r*), or in execution of particular acts of parliament. As regards the statement of the cause of action, the statute 11 & 12 Vict. c. 44, s. 1, enacts, as we have seen, that where an action is brought against a justice of the peace for any act done by him in the execution of his duty as a justice, with respect to any matter within his jurisdiction as such justice, the declaration shall expressly allege that the act was done maliciously and without reasonable and probable cause.

A declaration, which charges a magistrate with having maliciously,

(*o*) *Cohen v. Morgan*, 6 D. & R. 8.
Barber v. Rollinson, 1 Cr. & M. 390.
West v. Smallwood, 3 M. & W. 418;
ante, chs. 11, 12.
 (*p*) *Painter v. Liv. Gas Co.* 3 Ad. & E.

444.

(*q*) *Brown v. Chapman*, 6 C. B. 376.
Barber v. Rollinson, 1 Cr. & M. 390.
 (*r*) *Staigh v. Gee*, 2 Stark. 446.

and without any reasonable or probable cause, convicted the plaintiff of a certain specified offence, and for having, under colour of that conviction, by his warrant caused the plaintiff to be imprisoned until the conviction was removed by certiorari into the Queen's Bench, and quashed, and the plaintiff brought up by habeas corpus and discharged, discloses a good cause of action against the magistrate (s).

Declarations against justices for trespasses ordered or authorized by them in cases where they have acted without jurisdiction, or have exceeded their jurisdiction.—The stat. 11 & 12 Vict. c. 44, s. 2, enacts, as we have seen, that any person injured by any act done by a justice of the peace, in a matter of which, by law, he has not jurisdiction, or in which he shall have exceeded his jurisdiction, or by any act done under any conviction or order made, or warrant issued, by such justice in any such matter, may maintain an action against such justice, in the same form as he might have done before the passing of that statute, without making any allegation in his declaration that the act complained of was done maliciously and without reasonable and probable cause. The declaration, therefore, in these cases will be the same as the ordinary declaration for false imprisonment (ante, pp. 418, 419), or wrongful seizure and conversion of chattels by or by the order of any private unofficial person (ante, p. 224).

Evidence under pleas of not guilty—Not guilty by statute.—We have already seen, that in all actions against justices of the peace for any act done by them in the execution of their duty as justices, with respect to any matter within their jurisdiction, the plaintiff must allege in his declaration that the act was done maliciously and without reasonable and probable cause; and if at the trial, upon the general issue being pleaded, the plaintiff fails to prove his allegation he must be nonsuited, or a verdict given for the defendant (ante, pp. 536, 537). In all actions, moreover, against justices of the peace for any matter done by them in the execution of their office, they may plead the general issue—not guilty by statute, and give the special matter in evidence (t); and the same privilege is extended by various statutes to constables and officers in cases of actions against them for things done by them by virtue of their offices.

Evidence at the trial of actions against justices.—At the trial of any action brought against any justice of the peace for anything done by him in the execution of his office, the plaintiff must prove that the action was brought within the time limited in that behalf (ante, pp. 538, 539); that the proper notice of action (ante, pp. 539, 540) was given; that the cause of action was stated in such notice, and that it arose in the county or place laid as venue in the margin of the declaration; or, when the plaintiff

(s) *Burley v. Bethune*, 5 Taunt. 583.

(t) 11 & 12 Vict. c. 44, s. 10; ante, pp. 409–415.

sues in the county court, within the district for which such court is holden. If the act of a magistrate is done without jurisdiction it is a trespass; if within his jurisdiction, the action rests upon the corruptness of motive, and to establish this the act must be shown to be malicious (*u*).

Proof of malice and of the want of reasonable and probable cause for a conviction, and the issue of a warrant of commitment or distress.—When the conviction under which the plaintiff has been imprisoned by the order of the convicting magistrate has been quashed, the plaintiff must prove that the whole proceeding, the conviction, and the ministerial acts in execution thereof, were made and done maliciously, and without reasonable and probable cause (*ante*, pp. 536, 537). There is a wide distinction between an action against a prosecutor for a malicious prosecution, and an action against a magistrate for a malicious conviction and imprisonment thereunder. In the former case, proof that there was in reality no ground for imputing the crime to the plaintiff, shows that the prosecution was instituted without probable cause, and malice may be inferred from thence; but in an action against a magistrate for a malicious conviction, the question is not whether there was any actual ground for imputing the crime to the plaintiff, but whether, upon the hearing, there appeared to be none. The plaintiff must prove a want of probable cause for the conviction, which he can only do by proving what passed upon the hearing before the magistrate when the conviction took place. The magistrate has nothing to do with the guilt or innocence of the offender, except as they appear from the evidence laid before him. The conviction must be founded on that evidence alone, and it is impossible to show that there was no probable cause for the conviction without showing what that evidence was. There may be a malicious prosecution without a malicious conviction, and there may be an unfounded conviction by the magistrate without malice (*x*).

The question as to whether the magistrate has acted in the discharge of his duty with *bona fides*, and with reasonable and probable cause, is a question at the trial for the decision of the judge, and not for determination by a jury (*y*).

A justice's warrant put in by the plaintiff is evidence for the defendant of an information on oath before the justice recited in the warrant. The recital must be considered part of the warrant, and admissible evidence for the defendant, when the warrant is produced against him by the plaintiff, for the purpose of showing on what grounds, and in relation to what subject-matter he was acting when he granted it; in the same manner as if a magistrate were to commit for a felony on his own view, the warrant

(*u*) Erle, J., *Taylor v. Nesfield*, 3 Ell. & Bl. 730.

(*x*) *Burley v. Bethune*, 5 Taunt. 583.

(*y*) *Kirby v. Simpson*, 23 Law, J., M. C. 165; *ib.* Exch. 320.

reciting that he had seen the felony committed when put in evidence against him, would be admissible evidence for him that he had seen the felony committed (z).

Evidence at the trial of actions against constables and officers—Proof of the injury having been done in execution of a warrant of justices.—If the constable proves that he did the act complained of in the execution of a justice's warrant, he secures, as we have seen, an indemnity from liability, unless it is shown that he did not act in obedience to the warrant, or that he exceeded his authority and did more than the warrant authorized him to do, or that a demand in writing was made at his place of abode by the plaintiff, or his attorney or agent, in manner previously mentioned (ante, p. 538), of the perusal and copy of the warrant, and that the same was refused or neglected to be produced or shown, for the space of six days after demand. If the officer proves that he showed the warrant and gave the party demanding it an opportunity of taking a copy, then, if the action is brought against the officer or his assistants for anything done under the warrant, without making the justices who signed and sealed the warrant defendants, the jury are, on production and proof of the warrant at the trial, to give their verdict for the defendant, notwithstanding any defect of jurisdiction in the justices; and if the action is brought jointly against the justices and officer, or person acting in his aid, then, on proof of the warrant, the jury are to find for the constable or officer, or person acting in his aid, notwithstanding any such defect of jurisdiction (a).

By the common law, an officer who merely executed the warrant of a magistrate, was answerable for the consequences if the magistrate acted without authority. One object, therefore, of the legislature was to relieve the officer from that inconvenience, and to provide that, if he acted in obedience to the warrant of the magistrate, he should be protected. That was the object of the 6th section of 24 Geo. 2, c. 44, which makes it necessary to demand a copy of the warrant from the officer before he can be sued. If he gives that copy, although the party may be entitled to an action against the magistrate, yet, if he joins the officer in it, the production of the warrant will be a protection to the latter, and will entitle him to a verdict. The 6th section is, therefore, obviously intended to protect the officer in those cases only where the justice remains liable. It is necessary, in order to bring the officer within it, that he should act most strictly in obedience to his warrant: and in that case the statute gives him an absolute protection, at whatever time the suit may be brought against him (b).

(z) *Haylock v. Sparke*, 23 Law, J., M. C. 71.

(b) *Abbott, C. J., Parton v. Williams*, 3 B. & Ald. 332.

(a) 24 Geo. 2, c. 44, s. 6.

Of proof of a warrant of justices—Secondary evidence of the contents of a warrant.—Where the high constable of a borough, who had been served with a subpoena duces tecum, to produce a warrant under which he had made a levy, stated that he had no doubt he had deposited the warrant in his office; that he had searched for it and could not find it, and did not know what had become of it, and that the town-clerk had access to his office, and might have taken it away, it was held that secondary evidence might be given of the contents of the warrant (c).

Proof by the plaintiff of his demand of the perusal and copy of the warrant.—If a plaintiff's attorney, previous to bringing an action against a constable or officer for an imprisonment or seizure of goods by a constable, makes out two papers in writing precisely similar, purporting to be demands of the perusal and copy of the warrant, and signs both for his client, and then delivers one to the defendant, they are both duplicate originals; and the one retained by the attorney may be given in evidence at the trial, without proving any notice to produce the one left in the hands of the defendant. "Unless I am mistaken," observes Lord Eldon, C. J., "it is the usual course in actions of this sort to produce a duplicate original; and the same thing is done with respect to notices to quit. The practice of allowing duplicates of this kind to be given in evidence seems to be sanctioned by this principle, that the original delivered being in the hands of the defendant, it is in his power to contradict the duplicate original by producing the other if they vary" (d).

Proof by the defendant of the production of the warrant—Production and perusal of a copy of the warrant.—Where the warrant under which the constable acted was lodged in the hands of the gaoler at the time the plaintiff was taken to prison, and the constable proved that when the demand for the perusal of the warrant was made he produced a correct copy of it, telling the party making the demand that the original was in the hands of the gaoler, and no objection was made to the non-production of the original, it was held that there had been a substantial compliance with the requirements of the statute by the officer, so as to entitle him to the benefit of the statutory protection. "The conduct of the agent of the plaintiff," observes Lord Denman, C. J., "was such as to lead to the belief that the delivery of a copy of the warrant, under the circumstances, was all that was required. But for this, steps might have been taken to procure the original; and the plaintiff cannot therefore rely on its non-production to oust the constable of the protection of the statute" (e).

Damages recoverable in actions against justices of the peace.—By 11 & 12

(c) *Fernley v. Worthington*, 1 M. & Gr. 491.

(d) *Jory v. Orchard*, 2 B. & P. 41.

(e) *Atkins v. Kilby*, 11 Ad. & E. 785.

Vict. c. 44, s. 18, it is enacted, that where the plaintiff in any action against a justice of the peace, for anything done by him in the execution of his office, shall be entitled to recover, and shall prove the levying or payment of any penalty or money under any conviction or order as parcel of the damages he seeks to recover; or if he prove that he was imprisoned under such conviction or order, and seeks to recover damages for such imprisonment, he shall not be entitled to recover the amount of such penalty or sum so levied or paid, or any sum beyond the sum of 2*d.* as damages for such imprisonment, or any costs of suit whatever, if it is proved that he was actually guilty of the offence of which he was convicted, or that he was liable by law to pay the sum he was ordered to pay, and (with respect to such imprisonment) that he had undergone no greater punishment than that assigned by law for the offence of which he was convicted, or for non-payment of the sum he was ordered to pay.

If a magistrate has committed the plaintiff to prison in a case in which he has no jurisdiction, and the conviction is quashed (*ante*, p. 526), the magistrate is liable for all the usual and ordinary injurious consequences of a conviction and commitment, such as handcuffing, cutting off the hair, immersion in a bath, payment of penalties, fees, and all such expenses as are reasonably necessary to enable the plaintiff to procure his liberty; but the magistrate is not responsible for any unnecessary or excessive violence on the part of the officers executing the warrant (*f*).

(*f*) *Mason v. Barker*, 1 C. & K. 100. And see *ante*, pp. 420-432, as to damages recoverable in actions for false imprisonment.

CHAPTER. XV.

OF INJURIES RESULTING FROM THE EXERCISE OF STATUTORY POWERS AND AUTHORITIES—STATUTORY COMPENSATIONS FOR INJURIES AUTHORISED BY STATUTE.

SECTION I.—*Of injuries from the exercise of statutory powers and authorities.*—Of the exemption of parties from actions and suits in respect of things done under statutory authority—Duties and responsibilities of trustees and commissioners, contractors and workmen, acting in the exercise of statutory powers—Effect of clauses in particular statutes exonerating parties from all personal liability in respect of things done in the bonâ fide execution of the statute—Responsibility of parties for negligence, notwithstanding the existence of a protecting clause exempting them from personal liability—Injuries from the non-repair of authorized public works—Trespasses by custom-house officers acting in the execution of statutory powers.

SECTION II.—*Of actions against commissioners, local boards, and private persons, for wrongs done by them in the execution of statutory powers.*—Protecting clauses in statutes in favour of persons engaged in carrying such statutes into effect—Limitation of actions—Notice

of action—Tender of amends—Parties to be made defendants—Pleadings, defences, and evidence—Damages recoverable.

SECTION III.—*Of summary proceedings for the recovery of compensation for statutory damage under particular Acts of Parliament.*—Statutory compensation to owners and occupiers of land injuriously affected by the execution of public works under statutory authority—Statutory compensation to tenants and occupiers of lands taken for public works—Inquisition of damage—Notices by claimants of the nature and extent of the injury, and the amount of compensation required—Of the quashing of inquisitions where the jury have assessed damages improperly—Subjects of damage—Actions for the recovery of the compensation—Pleadings, defences, and evidence—Of the remedy for subsequent unforeseen damage—Of ascertaining disputed statutory damage by arbitration and before justices.

SECTION I.

OF INJURIES FROM THE EXERCISE OF STATUTORY POWERS AND AUTHORITIES.

Exemption of parties from personal liability in respect of things done under statutory authority.—An action will not lie on behalf of a plaintiff who

has sustained injury from the execution of powers and authorities given by an act of parliament, those powers being exercised with judgment and caution (*g*). But if the statutory powers are exceeded, or the things authorized to be done are carelessly and negligently done, an action is maintainable for damages (post, s. 2). "If the thing done is within the statute, it is clear that no compensation can be afforded for any damage sustained thereby, except so far as the statute itself has provided it; and this is clear on the legal presumption, that the act creating the damage being within the statute must be a lawful act" (*h*). Where, therefore, the legislature authorized a railway company to lay down a railway alongside a publick highway, it was held that the legislature must be presumed to have contemplated the possibility that the railway would be a nuisance to persons using the highroad, and that such persons must submit to the inconvenience for the sake of the general publick benefit of having a speedier and better means of conveyance than the old turnpike-road (*i*). And where a railway company was authorized to lay down a railway across a publick thoroughfare, and have gates across the highroad to prevent persons from passing along the road at the time when it would be dangerous by reason of trains being near at hand, it was held that a person who had been delayed and impeded in his journey along the highroad by reason of the necessary closing of the gates, had no right of action against the railway company for the injury he had sustained. Neither has the owner of an estate any right of action against a railway company for laying down a railway across a turnpike road close to the entrance of his estate under the powers of an act of parliament, by means whereof he is impeded and hindered in going from and returning to his house, and his horses are frightened and become ungovernable from the noise of the trains (*k*).

It has been held, that if a canal company has been authorized by statute to make and use a canal, and the canal is made in the usual manner, and water leaks out and comes upon the plaintiff's premises, without any negligence or breach of duty on the part of the canal company, the company will not be responsible in damages for the injury (*l*); but every canal company is bound to maintain and keep its canal in good order, and manage it so that it may not become a source of injury to the adjoining landowners; and if the water can be prevented from escaping from the

(*g*) *Ld. Truro, Lond. & North West. Rail Co. v. Bradley*, 3 Mac. & G. 341; 6 Rail Cas. 551. *Caledonian Rail. Co. v. Ogilvy*, 2 Macq. Sc. Ap. 246. *Boulton v. Crouther*, 2 B. & C. 706.

(*h*) *Duncan v. Findlater*, 6 Cl. & Fin.

908.

(*i*) *Rex v. Pease*, 4 B. & Ad. 42.

(*k*) *Caledonian Rail. Co. v. Ogilvy*, 2 Macq. Sc. Ap. 229.

(*l*) *Whitehouse v. Birm. Can. Co.*, 27 Law, J., Exch. 25.

canal, it is the duty of the company to adopt the necessary measures for the purpose (*m*).

If the property of the plaintiff adjoining a railway has been set on fire and destroyed by a spark from a locomotive engine and furnace, which the railway company is authorized by statute to use on their railway, the railway company is *prima facie* responsible for the damage done, for the acts of parliament authorizing railway companies to run locomotive steam furnaces through the country, do not authorize them to scatter sparks or lighted coals upon the adjoining land, to the injury of the proprietors thereof (*n*).

Injuries from the negligent execution of statutory powers.—"Powers given by statute," observes Watson, B., "are not to be used to the peril of the lives or limbs of the Queen's subjects. They are to be exercised reasonably, and with due care, so as not by negligence to cause dangers to others." Where, therefore, a canal company was authorized by statute to intersect highways with their canal, carrying the highway over the canal by means of bridges, it was held that they were bound to erect proper and suitable bridges, sufficient for all the requirements of an increasing traffic, and were bound to put up proper lights, fences, and guards for the protection of the publick; and that if they erected a swing-bridge, they must use all due and proper precautions for the protection of the publick whilst the bridge was open. If such a bridge is left open by boatmen using the canal, and a passenger traversing the highway falls into the canal and is injured, the canal company will be responsible for the injury in an action for negligence (*o*).

Where a municipal corporation was authorized by statute to lay down gas-pipes, and one of the workmen employed by the corporation in chipping the pipes in a publick thoroughfare, caused an iron chip from the pipe to fly into the plaintiff's face and put out his eye, it was held that the corporation was responsible in damages for the injury, although the work was a publick work done by them in the exercise of statutory powers (*p*).

If parties authorized by statute temporarily to close a publick highway have by mistake stopped up the wrong thoroughfare, or if they have continued an obstruction in a publick thoroughfare beyond the time authorized by statute, and an adjoining householder or shopkeeper sustains a particular injury beyond what is sustained by the publick at

(*m*) *Lawrence v. Gt. North. Rail. Co.*, 16 Q. B. 553; 20 Law, J., Q. B. 293.

(*n*) *Vaughan v. Taff Vale Rail. Co.*, 28 Law, J., Exch. 41; 3 H. & N. 743.

(*o*) *Manley v. St. Helen's Canal & Rail.*

Co., 2 H. & N. 840; 27 Law, J., Exch. 104.

(*p*) *Scott v. Mayor, &c. of Manch.* 2 H. & N. 204.

large; if he loses his customers, or his trade is injured by the unauthorized obstruction, there is a remedy by action for damages (q).

Where a railway company was authorized to make an embankment for the carrying of their railway across a valley, through which the waste waters from the adjoining land flowed away, and the embankment was made without proper openings and culverts for the passage of the waste water, by reason whereof the flood water was penned back after heavy rains and forced upon the plaintiff's land and injured his crops, it was held that the plaintiff was entitled to an action for damages. "It is contended by the defendants," observes Patteson, J., "that they have constructed their railway according to the provisions of their act of parliament, and that they are not liable for any consequences which may follow to the damage of the plaintiff; and the question is, whether the company are protected by their act? Here the company might, by executing their works with proper caution, have avoided the injury which the plaintiff has sustained; and we think that the want of such caution is sufficient to sustain the action" (r). And where a trading company was incorporated by statute for the purpose of manufacturing gas, and was authorized to make gas to light the streets of a town, it was held that the statute did not authorize the company to make gas so as to create a nuisance, and, therefore, that they were liable, notwithstanding the statute, to an action for damages for making gas so as to create a nuisance (s).

When powers are given to gas and water companies to open trenches in the streets, they must take care so to exercise those powers as not by negligence to cause injuries to passengers.

Duties and responsibilities of trustees and commissioners—Contractors and workmen acting in the exercise of statutory powers.—Trustees and commissioners of public works having certain public duties to perform under the authority of a statute, incur no personal responsibility for their acts if they act within the strict line of their duty; but if they order a thing to be done which is not within the scope of their authority (t), or are themselves guilty of negligence or misconduct in doing that which they are empowered to do, they render themselves liable to an action. If an action is brought against contractors and workmen who are personally engaged in the execution of public works, under the order or authority

(q) *Wilkes v. Hungerford Market Co.*, 2 Sc. 462, 463; 2 Bing. N. C. 281.

(r) *Lawrence v. Gt. Northern Rail. Co.*, 16 Q. B. 653, 654; 20 Law. J., Q. B. 203. *Broadbent v. Imp. Gas Co.*, 26 Law. J., Ch. 281. *Blagrove v. Waterworks Co.*,

1 H. & N. 369. *Sutton v. Clarke*, 6 Taunt. 42. *Grocers' Co. v. Donne*, 3 Sc. 357.

(s) *Broadbent v. Imp. Gas-light Co.*, 26 Law. J., Ch. 280.

(t) *Reg. v. Knight*, 8 W. R., Q. B. 204.

of trustees, or a publick board, and the damage of which the plaintiff complains is the natural result of the execution of a publick work under statutory authority, the action will fail ; but if the damage arises from the negligent execution of the work, and might have been avoided by the exercise of proper skill and care, the contractors and workmen will be personally answerable for the damage doné (*u*).

Where an action was brought by the plaintiff against one of several trustees under a turnpike act, who had joined in an order made by the trustees for cutting a drain through certain lands, whereby considerable damage had been done to the plaintiff's estate, and it appeared that the trustees had acted in the execution of statutory powers, in the best mode they could, under competent advice, and in the faithful execution of the duties imposed upon them by the legislature, it was held that they were not personally responsible for the damage done (*x*).

If the act done is in itself lawful, it can only become unlawful in consequence of the negligent and improper manner in which it is executed (*y*).

When commissioners entrust the execution of public works to contractors, engineers, and surveyors, who select their own workmen for the execution of the work, the commissioners are not personally liable for the mistakes or negligence of the contractors, engineers, or workmen. "Few commissioners know how such works should be executed ; they ought not, therefore, to be answerable for an imperfect execution of them ; nor can it be expected that they shall attend, day by day, to see that proper precautions are taken against accidents, or get up in the night to see that lights are burning to warn passengers of their danger from temporary obstructions. If by taking their office of commissioners they have not undertaken the performance of these duties, with what justice can they be charged with the consequences of the neglect of them ? No action can be maintained against a man acting gratuitously for the publick, for the consequence of any act which he was authorized to do, and which, as far as he is concerned, is done with due care and attention ; and such a person is not answerable for the negligent execution of an order properly given to others" (*z*).

Trustees of turnpike-roads, in whom the soil of the highway is not vested, and who are not in possession thereof (*ante*, p. 152), are not personally responsible for the negligence of contractors and others em-

(*u*) *Jones v. Bird*, 5 B. & Ald. 837.

(*x*) *Sutton v. Clarke*, 6 Taunt. 42.
Grocers' Co. v. Donne, 3 Sc. 357 ; 3 Bing.
 N. C. 34.

(*y*) *Boulton v. Crowther*, 2 B. & C. 700.

Governor, &c., of Cast Plate, v. Meredith,
 4 T. R. 700.

(*z*) *Best, C. J., Hall v. Smith*, 9 Moore,
 235, 238 ; *ante*, pp. 258, 259.

ployed by them in the repair of the roads, unless they personally interfere in the management of the works (*a*). Where certain trustees of a public road were empowered by act of parliament to place lamps along the road, and to make contracts for the cleansing of the road, and to take a night-toll for the purpose of enabling them to light and watch it, and certain labourers employed in cleaning the road left some scrapings in round heaps at the side of the road which became hard, and no lights being placed to light the road, the plaintiff stumbled over one of these heaps and was injured, it was held that the trustees were not personally responsible for the injury (*b*).

But if trustees and commissioners of public works, acting within their jurisdiction, and exercising powers given them by act of parliament, act wantonly and oppressively, and do unnecessary injury to individuals, they are personally responsible in damages to the parties injured. Thus, where an action was brought against certain commissioners of pavements for so raising a pavement as to obstruct the plaintiff's doors and windows, and it appeared that the commissioners were acting in the exercise of statutory powers, but that proper advice had not been taken, and the works were improperly executed, and the injury done to the plaintiff might have been readily avoided by laying down the pavement in a proper manner, it was held that the commissioners were personally responsible in damages for the nuisance they had unnecessarily and wantonly created (*c*).

Public commissioners and trustees who continue in the actual occupation of public works constructed and maintained for the use of the public, and in receipt of the tolls levied for the use thereof, are bound, as we have seen, to maintain and manage their property so that it may not become a source of danger to those who are invited to use it (*d*). But if they have demised the property to a lessee, who is in the actual use and occupation of it, and in receipt of the tolls, it is not then the duty of the commissioners or trustees to maintain the works in a safe and secure state, unless the particular statute under which they act imposes that duty upon them (*e*).

The liability of trustees and commissioners acting in the execution of statutory powers will, to a great extent, depend upon the provisions of the special act of parliament from whence they derive their authority, and the nature of the duties imposed upon them by statute; and although

(*a*) *Hunfreys v. Mears*, 1 M. & R. 187.
Duncan v. Findlater, 6 Cl. & Fin. 894.

(*b*) *Harris v. Baker*, 4 M. & S. 29.

(*c*) *Leader v. Moxon*, 2 W. Bl. 926; 3 Wils. 461.

(*d*) *Gibbs v. Trust. Liv. Docks*, 27 Law,

J., Exch. 321; 3 H. & N. 164; ante, pp. 81, 92.

(*e*) *Walker v. Goe*, 3 H. & N. 395; 27 Law, J., Exch. 427; ante, pp. 75-77, 106-108.

the soil of a harbour may be vested in them for publick purposes, yet if the care and superintendence of it is placed in a harbour-master, and the duty of directing the arrangement of the shipping, and of cleansing the harbour and keeping it free from obstructions, is imposed by statute upon the harbour-master, and not upon the trustees, an action will not lie against them personally or collectively for damages for obstructions (f).

Statutory liability of trustees and commissioners and publick boards under particular acts of parliament, in respect of publick funds, or monies which they are authorized to collect by rates.—By the Publick Health Act, the Towns Improvement Act, and various local statutes for effecting local improvements, provision is made for the election by the ratepayers of trustees, commissioners, or local boards, for the purpose of carrying the provisions of the several statutes into effect, for the levying of rates for the purpose of defraying expenses incurred by the trustees, commissioners, or local board in executing the works authorized to be done, and for making compensation out of the rates, or the publick monies, to parties who have been damnified by the exercise of the statutory powers. "These local boards," observes Lord Campbell, "are very peculiar bodies, the creatures of statute, to whom very extraordinary powers are given, and who may, therefore, reasonably be made liable to extraordinary liabilities, which must be determined by a true interpretation of the statute by which they are created." The result of the interpretation that has been put upon many of these local statutes, generally containing similar clauses and provisions, is, that if work injurious to an individual be done by an agent of the board by order of the board, whether that agent be a contractor exercising an independent employment, and selecting his own servants to do the work, or whether it be done by the immediate servants of the board, the board is responsible for any damage that may be sustained, whether it be the necessary result of the doing of the work, or whether it be caused by the negligence of the workmen employed upon the task. "If the jury find that the work was ordered and done *bonâ fide* in the execution of the act, then the agent is not under the statute personally liable, nor are the members of the board individually liable; but the action must be brought against the board, and the damages recovered will have to be paid out of the rates, and will ultimately fall upon the ratepayers." "It is said," observes Lord Campbell, "that if such a payment can be made out of the rates by the board, it is a great hardship on the ratepayers to be made to pay for the blunders or negligence of the board. That objection, however, seems to

(f) *Metcalf v. Hetherington*, 11 Exch. 257; 24 Law, J., Exch. 318.

be met by the consideration that the members of the board are elected by the ratepayers, and are, therefore, their representatives; and there would be greater injustice, perhaps, if it were held that persons injured by the negligence or wrongful acts of the board had no remedy" (g).

Where, therefore, certain commissioners for the improvement of a town, acting under the powers of the Publick Health Act (11 & 12 Vict. c. 63), made a new sewer communicating with the plaintiff's drain, and neglected to take proper precautions to prevent the plaintiff's premises from being flooded by storm waters, and by inundations from an adjoining river, which communicated with the new sewer, it was held that the plaintiff was entitled to maintain an action against the clerk of the commissioners, for the recovery of all the damage he had sustained by reason of the negligence of the commissioners, and that these damages were to be paid out of the rates levied under the act (h).

When an act of parliament authorizes certain specified things to be done, and directs a publick fund to be raised and applied towards the accomplishment of them, and the thing done is not within the statute, from the party doing it having exceeded the powers conferred on him, the publick fund directed to be raised by the statute is not then liable to make good "this private error or misconduct" (i).

Effect of clauses in particular statutes exonerating parties from all personal liability in respect of things done in the bonâ fide execution of the statute.—By the Local Board of Health Act (11 & 12 Vict. c. 63, s. 140), and the act for consolidating the Metropolitan Commissioners of Sewers (11 & 12 Vict. c. 112, s. 128), and other statutes, it is expressly provided that no matter or thing done by the Local Board of Health or the Commissioners of Sewers, or other commissioners or trustees named in these statutes, or by any clerk or officer, &c. or person acting under their direction, shall, if the matter or thing were done *bonâ fide* for the purpose of executing the act, subject them personally to any action or liability whatever. The effect of clauses of this sort is to absolve from liability to an action persons who, acting under the direction of the commissioners, or board, do some matter or thing *bonâ fide* which, but for that clause, would subject them to an action. The object of the legislature seems to be, not to leave a complaining party remediless, but to oblige him to bring his action against the commissioners as a body in the name of their clerk; in which case the liability would not be personal, and any damages that might be recovered would be payable out of the funds at the disposal of

(g) *Southampt. &c. Bridge Co. v. Local Board, Southampt.*, 8 Ell. & Bl. 812; 28 Law, J., Q. B. 41.

(h) *Ruck v. Williams*, 3 H. & N. 308;

27 Law, J., Exch. 357. *Allen v. Hayward*, 7 Q. B. 960.

(i) *Duncan v. Findlater*, 6 Cl. & Fin. 908.

the board or the commissioners. Where, therefore, certain contractors, acting under the directions of the Metropolitan Commissioners of Sewers, altered a sewer communicating with the plaintiff's drain, and thereby caused a nuisance to the plaintiff, for which he brought an action against the contractors, and the jury, in answer to a question left them by the judge, found that the contractors had, in making the sewer, acted *bond fide* under the orders and directions of the commissioners, it was held that the contractors were absolved from all personal liability for the nuisance. "The object of the legislature," observes Wightman, J.; "seems to have been in such a case not to leave the complaining party remediless, but to oblige him to bring his action against the commissioners as a body in the name of their clerk, in which case the liability would not be personal; and any damages that might be recovered, would be payable out of funds at their disposal under the provisions of the 125th section, which provides for the payment of the damages and costs recovered against the clerk in any such action (k). Here there was no evidence of any negligence on the part of the contractors, the sewer having been properly constructed by them under the orders of the commissioners, and the nuisance to the plaintiff being the natural and necessary result of the making of the sewer.

Responsibility of parties for negligence in the execution of an act of parliament, notwithstanding the existence of a protecting clause exempting them from personal liability in respect of things done in the bond fide execution of the statute.

— Although by various local statutes, authorizing the execution of public works under the authority of commissioners or of a board, it is enacted, that no matter or thing done by any officer or person acting under the direction of the commissioners or the board shall, if the matter or thing were done *bond fide* for the purpose of executing the act, subject him personally to any action; yet this does not exempt the party so acting from personal liability, if he has been guilty of negligence in the *bond fide* execution of a work directed by the statute to be executed, and this negligence has caused injury to another. Where there is no negligence, a party doing the act in obedience to the commissioners or the board would be properly absolved, and the board would have to make compensation; but if he is guilty of negligence in doing the act, and damage ensues, he is personally liable for the consequences (l).

Injuries from the non-repair of authorized public works.— When the authorized works have been constructed, the parties clothed with the possession of them are bound to maintain them in a proper state of security;

(k) *Ward v. Lee*, 26 Law, J., Q. B. 142; 7 Ell. & Bl. 430; post, s. 2.

(l) *Arthy v. Coleman*, 6 W. R., Q. B., 35; 30 Law, T. R. 101.

and if they are unable to do so from want of funds, or from causes over which they have no control, it is their duty to close the works to the publick, or give notice of their dangerous condition ; for if they invite or encourage persons to use them, with knowledge that they will incur peril in so doing, and injuries are sustained from the dangerous condition of the property, they will be answerable in damages for neglect of duty (n).

Seizure and detention of goods by custom-house officers acting in the execution of statutory powers.—Revenue officers, acting under an authority given them by statute to examine goods and merchandize, in order to ascertain the amount of duty payable upon them, or whether they are goods that may lawfully be imported, are not liable to an action for the seizure or the unlawful detention of the goods, unless the goods are taken and kept an unreasonable time, and there has been a clear abuse of authority on the part of the officers. If they, fairly and honestly believing that goods are liable to seizure, take and detain them, and the decision of the matter is referred to the proper authorities, they are not responsible for the detention of the property, although it may turn out that their judgment in the matter was erroneous, and that the goods ought to have been examined and passed (n). By 8 & 9 Vict. c. 87, s. 116, it is enacted, that if any information or suit shall be commenced or brought to trial on account of the seizure of any vessel, boat, or goods, &c., as forfeited by any act relating to the customs, wherein a verdict shall be found for the claimant, and it shall appear to the judge or court, before whom the same shall have been tried, that there was a probable cause of seizure, such judge or court shall certify on the record that there was such probable cause, and in such case the person making the seizure shall not be liable to an action on account of such seizure.

SECTION II.

OF ACTIONS AGAINST TRUSTEES, COMMISSIONERS, LOCAL BOARDS, AND PRIVATE PERSONS, FOR WRONGS DONE BY THEM IN THE EXERCISE OF STATUTORY POWERS.

Of protecting clauses in statutes in favour of persons engaged in carrying such statutes into effect.—Acts of parliament authorizing particular things

(m) *Gibbs v. Trust. Liv. Docks*, 3 H. & N. 177 ; 27 Law, J., Exch. 321. *Manley v. St. Helen's Can. Co.*, ib. Exch. 159 ; 2

H. & N. 840 ; ante, pp. 89–93.

(n) *Jacobsohn v. Blake*, 7 Sc. N. R. 784 ; 18 Law, J., C. P. 89.

to be done by private individuals, generally contain a clause for the protection of persons acting in the execution of the act, whereby it is enacted that all actions to be commenced against any person for anything done in pursuance of the act shall be laid and tried in the county where the fact was committed, and shall be commenced within a certain limited period after the fact committed, and not otherwise; and notice in writing of such action, and of the cause thereof, shall be given to the defendant one calendar month at least before the commencement of the action; and that no plaintiff shall recover damages in any such action if tender of sufficient amends shall have been made before such action brought, or if a sufficient sum of money shall be paid into court by or on behalf of the defendant after action brought (ante, pp. 409-415).

Of the limitation of actions in respect of things done under local and personal statutes.—By 5 & 6 Vict. c. 97, s. 5, it is enacted, that the period within which any action may be brought for anything done under the authority or in pursuance of any local and personal acts (o), shall be two years, or in case of continuing damage, then the action must be brought within one year after such damage shall have ceased, and so much of any enactment as appoints any other period of limitation is repealed.

When it is said that a man does a thing in pursuance of an act of parliament, it is not meant, as ● have seen, that he does it in strict accordance with the provisions of the statute, nor is it necessary to prove that he knew of the existence of the act, or that he was intending to act in execution of it at the time he did the thing complained of, for a man may be acting pursuant to a statute without knowing it (p).

Of the accrual of the cause of action and commencement of the period of limitation.—Where the defendant, who was a surveyor of highways, dug into the plaintiff's soil, threw down fences, and erected a wall, and the Highway Act (13 Geo. 3, c. 78, s. 81) required the action to be brought "within three months after the fact committed, and not afterwards;" and no action was brought within the three months, and after that period expired the surveyor raised the wall and finished it; it was held that the raising of the wall was not a fresh fact committed within the meaning of the statute, and would not extend the period of limitation beyond the three months (q). But when the cause of injury was a digging in the soil of a street, and the excavation at first produced no injury to the plaintiff, but some months after it had been made it weakened the foundations of the wall of the plaintiff's house, and caused it to fall, it was held that the falling of the wall of the house constituted the cause of

(o) *Cock v. Gent*, 13 Law, J., Ex. 24.

(q) *Wordsworth v. Harley*, 1 B. & Ad.

(p) *Read v. Coker*, 22 Law, J., C. P. 391.
201; ante, pp. 411, 412.

action; that no action was maintainable for the digging in the street until injury to the plaintiff resulted therefrom, and, therefore, that the time of limitation ran from the falling of the wall, and not from the time of the making the excavation (r). A continuing excavation of this sort has been said to be a continuing nuisance, constituting a continuing cause of action so long as it is permitted to exist (s).

Of notice of action.—The words in clauses of acts of parliament requiring notice of action to be given “in respect of anything done in pursuance of the act, or in execution of the powers thereof, apply to all cases where the parties are intending to act upon powers given by the statute, and not merely using it as a cloak for their own private purposes” (t). Those words do not mean acts done in strict pursuance of the act, because in such a case a party would be acting legally, and would not require protection. They mean, that a party to be entitled to the protection, must *bonâ fide* and really believe himself to be authorized by the act (u). Though he may erroneously exceed the powers the act gives, or inadequately discharge the duties imposed upon him, yet if he acts *bonâ fide* in order to execute such powers or to discharge such duties, he is to be considered as acting in pursuance of the act, and is entitled to the protection conferred upon persons so acting (x). Whenever, indeed, any action is brought against any one for anything done by the order, direction, or authority of a person authorized to act in the matter, under the provisions of a public or a private act of parliament, it will generally be found necessary to give notice of action. It must be given in cases of nonfeasance, where the party having undertaken to act in pursuance of some statute has failed to do what he ought to have done; as in cases of misfeasance, where he has acted negligently or wrongfully in the execution of the act (y).

Notice of action is required only where the action is brought for a tort or a quasi tort, and not for a breach of a specific contract (z).

Notice of action to gas companies and trading corporations and their officers.—The right to notice of action has been extended by numerous acts of parliament to all sorts of trading corporations, joint-stock companies, and associations called into existence by statute for a variety

(r) *Roberts v. Read*, 16 East. 217. *Bonomi v. Backhouse*, ante, pp. 9, 431.

(s) *Holroyd, J., Howell v. Young*, 5 B. & C. 268. *Gillon v. Boddington*, 4 R. & M. 164.

(t) *Oakley v. Kensington, Can. Co.*, 5 B. & Ad. 139. *Beechy v. Sides*, 9 B. & C. 809.

(u) *Hughes v. Buckland*, 15 M. & W. 353. *Gaby v. Wills. Canal Co.*, 3 M. &

S. 589; ante, p. 411.

(z) *Smith v. Wiltshire*, 2 B. & B. 620. *Smith v. Shaw*, 10 B. & C. 284.

(y) *Joule v. Taylor*, 7 Exch. 58; ante, pp. 409–415.

(z) *Wightman, J., Davis v. Curling*, 8 Q. B. 293. *Fletcher v. Greenwell*, 4 Dowl. P. C. 166. *Davies v. Mayor, &c. of Swansea*, 22 Law, J., Exch. 297.

of local and private purposes, and purposes of gain, so that whenever an action of tort is brought against a company or association which is incorporated, or regulated by statute, or derives its powers from some special act of parliament, or against the officers of any such company or association, it will, in general, be necessary to give notice of action. This will be found to be the case in actions against many of the gas companies or their officers for things done by them under the powers or in pursuance of their several acts of incorporation, also against certain railway companies (a) when there has been an omission of some duty imposed upon the company by the act, such as the non-repair of fences, or the charging or levying excessive tolls under the powers of their act of incorporation (b); but when the action is brought against them for a breach of their duty as common carriers, no notice of action is requisite (c).

Neither the Lands' Clauses Act nor the Companies' Clauses Consolidation Act contain any section requiring notice of action to be given to companies in respect of things done by them under the authority of those statutes; but s. 141 of the Companies' Clauses Act (8 Viet. c. 16), and s. 135 of the Lands' Clauses Consolidation Act (8 Vict. c. 18), entitle the company to a verdict, if before action they tender sufficient amends.

Notice of action to toll and to collectors and revenue-officers. — Notice of action also is required to be given in respect of things done by toll-collectors on turnpike-roads acting in pursuance of the General Turnpike Act, or certain special acts of parliament authorizing the collection of toll (d), or by revenue-officers (e), tax-collectors (f), or commissioners and other persons acting in the execution of the several acts relating to the land-tax (g). If the officer has reasonable grounds for thinking that his duty required him to do the injurious act complained of, he is entitled to notice of action (h). If a toll or tax, though not legally payable, is demanded *bonâ fide* by a collector, who intends to act right, and has fair and reasonable grounds for believing that he has a right to demand the money, the collector is entitled to the statutory protection, and must have notice of action (i). But if a revenue-officer, toll or tax-collector, improperly, and without colour of right, extorts money by virtue of his office, and in plain and manifest abuse of the statute under which he acts, he

(a) *Carpue v. Lond. & Bright. Rail. Co.*, 5 Q. B. 747.

(b) *Kent v. Gt. Western Rail. Co.* 3 C. B. 725.

(c) *Palmer v. Grand Junc. Rail. Co.*, 4 M. & W. 786. *Garton v. Gt. West. Rail. Co.*, 7 W. R. Ex. 478; 83 Law, T. R. 210.

(d) *Waterhouse v. Keen*, 4 B. & C. 200.

(e) *Greenway v. Hurd*, 4 T. R. 558.

(f) 43 Geo. 3, c. 89, s. 70.

(g) 5 & 6 Wm. 4, c. 20, s. 19. *Thomas*

v. Williams, 13 Law, J., Exch. 87.

(h) *Daniel v. Wilson*, 5 T. R. 1.

(i) *Waterhouse v. Keen*, 4 B. & C. 211.

will then lose the statutory protection, and will not be entitled to any notice of action. If he makes an improper seizure of goods, and then takes money as a bribe to deliver them up again, there is no statutory protection (*k*). If he makes a wholly unauthorized charge, and is guilty of manifest extortion under a threat of legal proceedings, or the pressure of a distress (*l*), he cannot shelter himself under the provisions of the statute.

Notice of action against officers of local boards of health.—A contractor who contracts with a local board of health for the digging of drains and wells and making excavations, is a person acting under the direction of the board within 11 & 12 Vict. c. 63, s. 189, and is entitled to notice of action for digging a hole in a publick thoroughfare, and leaving it unguarded and without a light, although the board might not be liable for the contractor's act (*m*).

Notice of action against surveyors of highways and persons acting in execution of the highway acts.—The Highway Act, 5 & 6 Wm. 4, c. 50, s. 109, requires notice of action to be given for anything done in pursuance of the act. Where, therefore, a surveyor of highways left an obstruction of gravel and sand in a highway, and had notice to remove it, and failed so to do, it was held that he was entitled to notice of action (*n*). And where a highway board, with their surveyor, trespassed upon private grounds, and broke down a private gate in the assertion of a supposed right of way which had no existence, it was held that they were entitled to notice of action. "The defendants," observes Lord Denman, "might believe that they were acting in execution of the power to remove obstructions in public roads without coming to a very irrational conclusion. The argument against it is, indeed, founded on a specific clause, which prescribes a different course of proceeding to this end, but we are not prepared to hold that officers of this description are bound to argue on a comparison of clauses in a long act, and to decide correctly" (*o*).

A person acting as surveyor under an appointment in fact, though informal and illegal, is, nevertheless, entitled to notice of action if he was acting in what he did in the *bonâ fide* belief that he had been properly appointed (*p*).

Of tender of amends before action.—The statutes requiring notice of action to be given further provide, as we have seen, that the action shall not be maintainable, and that the jury shall give a verdict for the defendant, if there has been a tender of sufficient amends before action (*ante*,

(*k*) *Irving v. Wilson*, 4 T. R. 486.

(*l*) *Umphelby v. M'Lean*, 1 B. & Ald. 42.

(*m*) *Newton v. Ellis*, 5 Ell. & Bl. 115;
24 Law, J., Q. B. 337.

(*n*) *Davis v. Curling*, 8 Q. B. 292.

(*o*) *Smith v. Hopper*, 9 Q. B. 1014.

(*p*) *Hughes v. Buckland*, 15 M. & W.
355.

pp. 410, 415). This is the case with the Lands' Clauses Consolidation Act (8 & 9 Vict. c. 18, s. 135); the Railway Clauses Act (8 & 9 Vict. c. 20, s. 139); the Waterworks' Clauses Act (10 & 11 Vict. c. 17, s. 84); the Harbours, Docks, and Piers' Clauses Act (10 & 11 Vict. c. 27, s. 91); the Towns' Improvement Clauses Act (10 & 11 Vict. c. 34, s. 209); the Commissioners' Clauses Act (10 & 11 Vict. c. 16, s. 103); the Markets and Fairs' Clauses Act (10 & 11 Vict. c. 14, s. 51); the Town Police Clauses Act (10 & 11 Vict. c. 89, s. 72), and the Cemeteries' Clauses Act (10 & 11 Vict. c. 65, s. 61).

Parties to be made defendants.—All parties who have been guilty of negligence or misconduct in the execution of public works under the authority of an act of parliament, or have exceeded the powers entrusted to them (g), are, as we have seen, liable to be sued by the party injured (ante, pp. 551–558); but if the injury of which the plaintiff complains is the natural and necessary result of the execution of the authorized act, the liability will be regulated and governed by the statute. Where an action was brought against a municipal corporation for an injury to the plaintiff's eye, by reason of the negligence of a servant of the corporation, who had been employed by them to chip a gas-pipe, and the corporation pleaded that the injury was done in the execution of their Local Improvement Act, and without any neglect or mismanagement of the defendants otherwise than by their workman, and that the workman employed by them was well skilled and qualified, it was held that the plea was no answer to the action (r).

Section 138 of the Public Health Act, 1848 (11 & 12 Vict. c. 63), provides that the local board of health of any non-corporate district may be sued in the name of the clerk for the time being concerning any matter or thing whatsoever relating to any matter done by them under the provisions of the act, and that the clerk shall be reimbursed out of the general district rate all costs and damages. By s. 144 full compensation is to be made out of the general or special district rates to all persons sustaining damage by reason of the exercise of any of the powers of the act, which damage may be settled by arbitration in case of dispute, or be recovered in a summary way before justices if the sum claimed does not exceed 20*l*. And by s. 140 it is enacted, that no matter or thing done by any member of the local board, or by the officer of health, clerk, surveyor, inspector of nuisances, or other officer or person whomsoever acting under the direction of the local board, shall, if the matter or thing

(g) *Reg. v. Knight*, 8 W. R. 293.

(r) *Scott v. Mayor, &c. of Manchester*, 1 H. & N. 59; 2 H. & N. 204.

were done *bond fide* for the purpose of executing the act, subject them, or any of them, personally to any action, liability, claim, or demand whatsoever, and that any expense incurred by such local board, member, officer of health, clerk, surveyor, inspector of nuisances, or other officer or person acting as last aforesaid, shall be borne and repaid out of the general district rates levied under the authority of the act.

Where public health acts, or local acts for the improvement of towns, and the authorisation of public works to be effected through the medium of trustees or commissioners, or a board, enact that the trustees or the commissioners, or the board, shall and may be sued in the name of their clerk, it is generally meant that they must so sue and be sued; so that an action for a wrong done in the execution of the act cannot be brought against individual commissioners or trustees, or individual members of the board. In some cases these statutes require the action to be brought against the clerk (s); in others they require the action to be brought against the board in its statutory name, as a quasi-corporate body (t). If it is sued in a wrong corporate name, the misnomer must be pleaded in abatement.

Contractors and workmen executing public works under the direction, and by the orders of a local board acting in the exercise of statutory powers, are responsible in damages to parties who have been injured by reason of the negligent execution of the works intrusted to them to execute, although the statute enacts that parties shall not be personally liable for anything done by them in the *bond fide* execution of the statute (u).

Pleadings — Plea of not guilty — Repeal of clauses in local and personal acts enabling parties to plead the general issue, and give the special matter in evidence.—The statute 5 & 6 Vict. c. 97, s. 3, repeals so much of any clause or provision in any public local and personal act, or local and personal act, or in any act of a local and personal nature, as enables any party to plead the general issue only, and to give any special matter in evidence. The plea of not guilty by statute, therefore, is not available for railway companies, gas companies, trading corporations, local commissioners, or their subordinates, or any persons acting in the execution of local acts for the improvement, lighting, and paving of towns, unless there is some special enactment in that behalf overriding the provisions of the last-named statute. Whenever, therefore, the defence of the want of

(s) *Allen v. Hayward*, 7 Q. B. 973.
Ruck v. Williams, 3 H. & N. 308.

(t) *Southampt. &c. Bridge Co. v. Local*

Board of Southampt. 8 Ell. & Bl. 814;
 ante, pp. 555, 556.

(u) *Arthy v. Coleman*, ante, p. 557.

notice of action is founded on the provisions of a local and personal act, it must be specially pleaded, and cannot be given in evidence under the plea of not guilty by statute (x). Thus, a railway company, whose local and personal act requires notice of action to be given to the company, must plead the want of such notice specially (y); and persons who claim to have acted under local acts for paving, lighting, watching, or cleansing towns (z), or any of the local and personal acts requiring notice of action to be given, must plead specially the want of such notice. If upon the face of the declaration of the cause of action there is nothing to show that the action is brought in respect of something done, or omitted to be done, in pursuance of the statute, the plea must contain an averment to that effect, and show on the record that the action is brought for some matter or cause of action in respect of which notice of action ought to have been given. If it fails to do this, and the matter does not appear upon the record, the plea will be bad after verdict (a).

Of pleas of tender of amends before action.—It is not necessary for a party who pleads a tender of amends before action to pay the money into court, as the tender is not a tender of any debt, but is a matter collateral to the defence. If the plaintiff chooses to renounce the tender, and prefers the chance of what he may gain by verdict, he has no claim to the amount tendered, and if the verdict goes against him he gets nothing (b).

Of payment of money into court after action.—The statutes for the protection of persons who have made a mistake in the exercise of a statutable authority, honestly believing that they were justified by it, further enable such persons as we have seen, if they have neglected to tender amends before action, to offer compensation for the wrong they have unintentionally committed by the payment of money into court, and they enact that the defendant is to be entitled to a verdict if he has paid into court a sum which a jury may think an adequate compensation for the wrong suffered (ante, p. 415).

Pleas justifying the doing of the act complained of under the powers and with the authority of an act of parliament.—When the defence relied upon is that the act complained of was done under the authority of an act of parliament, the defendant must justify under the act, unless the matter of justification is authorized to be given in evidence under a plea of not guilty. When the defendant justifies under the statute, he may plead generally that the several acts, matters, and things of which the plaintiff

(x) *Davey v. Warne*, 14 M. & W. 208.

(y) *Edwards v. Gt. Western Rail. Co.*, 11 C. B. 650.

(z) *Law v. Dodd*, 17 Law, J., M. C. 65.

(a) *Garlon v. Gt. West. Rail. Co.*, 7 W. R. Ex. C. 478; 32 Law, T. R. 240.

(b) *Jones v. Gooday*, 9 M. & W. 744.

complains, were lawfully done by the defendant in exercise, and by virtue of the powers and authorities given for that purpose to the defendant by an act of parliament made, &c., intituled, &c. (c).

Evidence at the trial—Proof of notice of action.—When the statute requiring notice of action to be given specially directs that no evidence shall be given of anything not included in the notice, the plaintiff must prove the giving of notice, in order to lay a foundation for the other evidence (d).

SECTION III.

OF SUMMARY PROCEEDINGS FOR THE RECOVERY OF COMPENSATION FOR STATUTORY DAMAGE UNDER PARTICULAR ACTS OF PARLIAMENT.

Of statutory compensations to owners and occupiers of land who have sustained injury, or whose land has been injuriously affected by the execution of works authorized to be done by statute.—The statute 8 & 9 Vict. c. 18, commonly called the Lands' Clauses Consolidation Act, 1845, consolidates into one act certain provisions to be thereafter incorporated into acts of parliament, relative to the acquisition of lands required for undertakings or works of a public nature, and to the compensation to be made to the owners or occupiers of or parties interested in such lands, for any damage that may be sustained by them by reason of the execution of the works authorized by statute. If the claim for compensation by such persons is under 50*l.*, it is to be settled (s. 22) by two justices; if it exceeds 50*l.*, the claimant may elect (s. 28) to have it settled by arbitration, or by the verdict of a jury (ss. 24–49). The General Compensation Clause (s. 68) provides, that if any party shall be entitled to compensation in respect of any lands, or of any interest therein, which shall have been taken for, or injuriously affected by the execution of the works, and for which satisfaction has not been made, and the compensation claimed exceeds 50*l.*, such party may have the same settled by arbitration or the verdict of a jury, as he shall think fit. And if lands required or taken for the purposes of the undertaking, or injuriously affected thereby, are in the possession of a person having no greater interest therein than that of a tenant from year

(c) *Beaver v. Mayor of Manchester*, 8 Ell. & Bl. 44; 26 Law, J., Q. B. 311.
Watkins v. Gt. Northern Rail. Co., 16

Q. B. 961.

(d) *Johnson v. Lord*, 1 M. & M. 444; ante, pp. 544–548.

to year, and such person be required to give up possession of the whole or of part of such lands before the expiration of his interest therein, the amount of compensation is, if the parties differ, to be settled (s. 121) by two justices. The general words of the 68th section of the statute, therefore, are restricted by s. 121, so that the proceeding in cases falling within the latter section must be in the mode there prescribed (e).

By another statute (8 & 9 Vict. c. 20), commonly called the Railway Clauses Consolidation Act, consolidating into one act sundry provisions to be introduced into acts of parliament thereafter passed, authorizing the construction of railways, it is provided (s. 6), that in exercising the power given to the company to construct a railway, the company shall make to the owners and occupiers of, and all other parties interested in, any lands taken or used for the purposes of a railway, or injuriously affected by the construction thereof, full compensation for the value of the lands so taken or used, and for all damage sustained by such owners, occupiers, and other parties, by reason of the exercise as regards such lands of the powers vested in the company, the amount of compensation to be ascertained and determined in the manner provided by the Lands' Clauses Consolidation Act.

The statutory remedy provided by these acts of parliament is substituted in lieu of the ordinary remedy by way of action, so that parties aggrieved by anything done in the exercise of the powers granted by the statute must follow the statutory remedy, and cannot resort to an action for damages (f). The fact of the claimant being entitled to the compensation he seeks is a condition precedent to his right to avail himself of the machinery provided by s. 68 of the Lands' Clauses Consolidation Act. If, therefore, the claimant has no title to compensation, the whole proceedings before the arbitrator or a jury are coram non iudice.

Injuries establishing a right to the statutory compensation.—Compensation under these statutes can, in general, only be recovered in those cases where, except for the act of parliament, an action for damages would be maintainable. Where, therefore, the New River Company, in the exercise of its statutory powers, constructed some underground works which drew off the water from the plaintiff's well, it was held that the plaintiff was not entitled to compensation under the statute, as the company, in drawing off the water from the well, had not infringed any right of the

(e) *Reg. v. Manchr. &c. Rail. Co.* 4 Ell. & Bl. 103.

(f) *Watkins v. Gl. Northern Rail. Co.*, 16 Q. B. 968.

plaintiff, or done anything which would have rendered them liable to an action at common law, independently of the statute (*g*).

In cases of railway compensations, it has been held that the occupier of a house and shop adjoining a railway is entitled to the statutory compensation for damage sustained by him in consequence of the dust and dirt from the railway works having penetrated his shop and damaged his goods, and driven away his customers (*h*), or from the beer in his cellar being disturbed and clouded, and rendered unfit to drink, from the vibration caused by the passing trains (*i*); or from the stoppage or diversion of a publick thoroughfare, preventing customers from coming to his shop, or from obstructing the access of light and air to ancient windows, provided in all these cases that the act causing the injury has been authorized to be done by act of parliament, and has been judiciously and carefully done in the exercise of the statutory powers.

Wherever real property is depreciated in value by the construction of a railway, and the depreciation is caused by that being done which, but for the powers contained in the act of parliament, would have been actionable as between the landowner and the company, that is a case for compensation under the provisions of the statute, and for the adoption of the statutory remedy, to the exclusion of an action at common law. Thus, if a private way of the landowner has been obstructed, or his enjoyment thereof infringed or rendered less convenient, by reason of the private way being crossed by a railroad, and obstructed by railway-gates, a case for the statutory compensation is made out (*k*); but where a publick turnpike-road is crossed by a railway, and no special damage has been sustained thereby, and no greater injury or inconvenience suffered by a complaining party than that which is common to all the Queen's subjects passing along such publick highway, there is no ground for statutory compensation, and no action for damages is maintainable (*l*).

Of statutory compensations to lessees and yearly tenants who have been required to give up land for railways and undertakings of a publick nature.—In the case of lands under lease required for railways or undertakings of a publick nature, it is enacted (8 & 9 Vict. c. 18) that every lessee shall be entitled to receive compensation for damage done to him in his tenancy by reason of the severance of his land for the purposes of the undertaking

(*g*) *New River Co. v. Johnson*, 8 W. R. Q. B. 179; 1 Law, T. R., N. S., 295; ante, p. 5.

(*h*) *East & West Ind. Docks, &c. Co. v. Gatlif*, 3 Mac. & G. 155; 20 Law, J., Ch. 217; 6 Rail. Cas. 371. *South Staff. Rail. Co. v. Hall*, ib. 400.

(*i*) *Lond. & North-Western Rail. Co. v. Bradley*, 6 Rail. Cas. 556; 3 Mac. & G. 336.

(*k*) *Glover v. North Staff. Rail. Co.*, 16 Q. B. 923.

(*l*) *Caledonian Rail. Co. v. Ogilvy*, 2 Macq. Sc. Ap. 23.

or otherwise, by reason of the execution of the works authorized by statute, and that if any such lands be in the possession of any person having no greater interest therein than as a tenant from year to year, and such person be required to give up possession before the expiration of his interest, he shall be entitled to compensation for the value of his unexpired term or interest, and for any just allowance which ought to be made to him by an incoming tenant, and for any loss or injury he may sustain; or if a part only of such lands be required, compensation for damage done to him in his tenancy by severing the lands held by him, or otherwise injuriously affecting the same. A lessee, therefore, who has been obliged to give up his house and business for the purpose of a railway, is entitled to compensation for the loss he sustains in giving up his business, until he can get other suitable premises for carrying it on (m).

Of the requisite notice to a railway company, or other public company or association, of the nature and extent of the injury sustained, and of the amount of compensation required.—Every owner and occupier of land who has sustained injury, or whose land has been injuriously affected by the execution of works of a public nature authorized by statute, must give notice in writing to the railway company, declaring whether he desires a settlement by arbitration or by the verdict of a jury, stating in such notice the nature of his interest in the lands in respect of which he claims compensation, and the amount claimed by him. If he desires an arbitration and gives the requisite notice, and the compensation claimed is not paid or agreed to be paid, he will be entitled to have the amount of the compensation settled by arbitration, pursuant to the provisions of the statute (n). If, on the other hand, he desires to have the amount of compensation settled by the verdict of a jury, and gives the requisite notice (s. 68), and the amount claimed is not paid or agreed to be paid, the railway company is bound, within twenty-one days after the receipt of the notice, to direct the sheriff to summon a jury for settling the amount of compensation in the manner provided by the statute, and in default thereof the company is liable to pay to the party injured the amount of compensation claimed, and the same may be recovered by action in any of the superior courts (o).

Where the owner of land taken by a railway company gave notice under s. 68 of this statute of his desire to have the amount of compensation settled by a jury, and before the expiration of the twenty-one days limited by that section for the company to issue their warrant to the sheriff

(m) *Jubb v. Hull Dock Co.*, 9 Q. B. 443.

(n) 8 & 9 Vict. c. 18, ss. 25-37.
(o) 8 & 9 Vict. c. 18, s. 68.

to summon a jury, the owner gave a second notice of his desire to have the question settled by a special jury under s. 54, which fixes no time for the issuing of the warrant, it was held that the company were bound to issue their warrant for the special jury within twenty-one days after the receipt of the first notice, or pay the compensation claimed (*p*).

Evidence on the trial of the inquisition before the sheriff's jury.—It is not competent to the sheriff's jury to determine the right of a claimant to compensation. It is for the court to decide upon the right or title of the party to be compensated, and for the jury to settle the amount, so that the amount has to be tried first and the title last (*q*). Neither the jury nor an arbitrator has any jurisdiction to inquire into collateral matters, creating a head of damage distinct from the damage flowing from the exercise of the statutory powers, unless the parties mutually consent to refer such matters to them for their decision (*r*).

Assessment of future contingent damages.—The jury have no right to assess prospective damages, unless there be an actually existing cause of damage proved before them. The provision respecting future damage is, that the jury shall assess the sum of money to be paid by way of recompense for the future temporary or perpetual continuance of any recurring damage which shall have been occasioned by the exercise of the powers thereby granted. A cause of damage, therefore, must exist in some work of the company already done, to give the jury the power of computing the future damage. They then know what the injury is at present, how often it may accrue, and from these data they have the power of making a contingent assessment of damages. When no injury has been actually done, there is nothing in respect of which future damages can be assessed (*s*). When the amount of damage to be sustained in future years is not capable of being ascertained, and depends upon a variety of contingencies which may or may not occur, the compensation cannot be assessed at once and for ever in respect of this future contingent injury.

The cases relating to railways seem to establish that compensation is given in respect of the calculable damage caused, or to be caused, in or by the execution of the permanent works of the company authorized by the statute, such as obstructing ways, injuring lights, and not the uncertain prospective damage or injury which may or may not result from the use of the railway after it has been constructed (*t*). Thus, where the plaintiff

(*p*) *Glyn v. Aberdare Rail. Co.*, 6 C. B., N. S., 359; 28 Law, J., C. P. 271; 7 W. R., C. P., 443.

(*q*) *Reg. v. Lond. & North West. Rail. Co.*, 3 Ell. & Bl. 465.

(*r*) *Re Byles*, 11 Exch. 464; 25 Law,

J., Exch. 53.

(*s*) *Parke, B., Lee v. Milner*, 2 M. & W. 841.

(*t*) *Broadbent v. Imp. Gas Co.*, 26 Law, J., Ch. 281.

and a railway company, before a railway was constructed, referred to arbitration the sum to be paid by the company for the purchase of part of the plaintiff's land, and as compensation for all injury and damage to his remaining estate by severance or otherwise, it was held that the compensation awarded related only to all damage known or contingent by reason of the construction of the railway on the land purchased, and to such other damage arising from the construction of the railway as was apparent and capable of being ascertained and estimated at the time when the compensation was awarded, that it did not embrace contingent and possible damages which might arise afterwards, and which could not at the time have been foreseen by the arbitrator, and that the plaintiff was entitled, notwithstanding the award, to claim compensation for such damages (u).

Of the quashing of inquisitions of damages where the jury have assessed damages to which the claimant is not legally entitled—Removal of the inquisition by certiorari.—If upon an inquisition of damages resulting from the execution of works done under the authority of an act of parliament, the under-sheriff has directed the jury to assess and include in their verdict damages for an item which they ought not to have included, and there is reasonable evidence that they did include such an item in making their calculation, a certiorari clearly lies, inasmuch as the jury have thus committed an excess of jurisdiction; and the excess of jurisdiction may be shown upon affidavits, and need not appear upon the face of the proceedings. Thus, where it was shown by affidavit that the under-sheriff directed the jury that they might give compensation in respect of an alleged nuisance resulting from persons standing on a railway platform, which had been constructed under statutory authority near the plaintiff's dwelling-house, and thence overlooking the plaintiff's premises, it was held that the nuisance was not a legitimate subject of compensation; that the jury had exceeded their jurisdiction in giving compensation in respect of it, and as they had given one lump sum for the damage done, the court quashed the inquisition (x). Wherever, therefore, several items of claims are brought under the consideration of a sheriff's jury, and it is doubtful whether they are all legitimate subjects of compensation, the proper course is for the under-sheriff to direct the jury to find separately upon each item, to guard against the quashing of the whole inquisition.

Recovery of the amount of compensation assessed by a jury under the Lands' Clauses Consolidation Act.—Although the verdict of the jury and the judgment are made records, they are not made records of any superior

(u) *Lawrence v. Gt. Northern Rail. Co.*, 16 Q. B. 643.

(x) *Re Penny*, 7 Ell. & Bl. 660; 26

Law, J., Q. B. 225. Reg. v. South Wales Rail. Co. 13 Q. B. 994. *Caledonian Rail. Co. v. Ogilvy*, 2 Macq. 229.

court, nor is there any express provision for any writ of execution to issue for enforcing them. The consequence is, that an action must be resorted to for recovering the amount (y).

Of the declaration in actions for railway compensations.—The plaintiff's declaration in an action for the amount of compensation assessed by a sheriff's jury under 8 Vict. c. 18, s. 68, usually sets forth the plaintiff's possession of a house or land, that it was injuriously affected by the execution of the works and the construction of the railway, and that the plaintiff was entitled to compensation; whereupon he gave notice to the railway company, stating the nature of his interest in the land, and the amount of compensation claimed by him pursuant to the statute in that behalf, that the plaintiff claimed to have the amount settled by a jury, that a jury was duly impanelled and sworn, and the parties having appeared and given evidence before them, the jury assessed the amount of compensation for the injury to the house at, &c., and for the injury to the plaintiff's business, at, &c., amounting in the whole to the sum of £—, and that the sheriff gave judgment for that sum to be paid to the plaintiff according to the provisions of the said statutes, and that the verdict and judgment were duly deposited with the clerk of the peace, by whom the same were kept among the records of the court of quarter sessions, yet the defendants had not paid to the plaintiff the said sum of £—, or any part thereof (z).

Pleadings—Defences—Traverse of the injury to the land.—The finding of the sheriff's jury on an inquisition under s. 68 of the Lands' Clauses Consolidation Act (8 Vict. c. 18), is not conclusive; and, therefore, in an action brought on such an inquisition, it is competent to the defendant to traverse the allegation that the plaintiff's property was damaged or injuriously affected by the construction of the railway, or by the exercise of the powers vested in the company within the meaning of the act, and that the plaintiff was entitled to compensation under the provisions of the statute in respect of the same having been damaged or injuriously affected; or to plead these facts, and to prove that the subject-matters of the claim submitted to the determination of the sheriff's jury are not such as are contemplated by the 68th section (a).

If the sheriff's jury had any jurisdiction over the subject-matter of the inquiry, and power to award compensation to the plaintiff, the defendant cannot afterwards, in an action upon the judgment, set up as a defence that there was an excess of jurisdiction as to some part of the

(y) Coleridge, J., *Reg. v. Lond. & North-West. Rail. Co.*, 3 Ell. & Bl. 468.

(z) *Chapman v. Monm. Rail. &c. Co.*, 11 Exch. 267; 27 Law, J., Exch. 97.

(a) *Chapman v. Monm. Rail. &c. Co.*, ut sup. *Reg. v. Lond. & North-West Rail. Co.*, 3 Ell. & Bl. 468.

claim. In an action upon the judgment, it must be taken that there was jurisdiction, and the quantum of it cannot be investigated, for if that could be done the plaintiff would have to go down to trial prepared to prove each part of his claim, and such a course would be most inconvenient. Where, therefore, an action was brought upon a judgment following an inquisition found before the sheriff in a proceeding by the plaintiff to obtain compensation for an injury done to his premises by works carried on under the authority of an act of parliament, and the defendant sought to bar the action, and prevent the plaintiff from recovering, by proving that part of the damages was given in respect of an injury arising from the cutting off some water to which the plaintiff had no legal title, it was held that no such defence was open to the defendant in that action, and that if the sheriff's jury had improperly taken upon themselves to give damages in respect of the loss of the water, the matter should have been set right by certiorari, and the inquisition quashed (*b*).

Of the recovery of unexpected damage which has accrued after compensation has been sought for and obtained.—When, after compensation has been obtained for the known calculable injury, some unexpected, unforeseen damage has been sustained, and this damage is the natural and necessary result of the construction of the works authorized by statute, the remedy appears to be by resort to the sheriff's jury, under s. 68 of the Lands' Clauses Consolidation Act (*c*). Thus, if some violent storm has destroyed a portion of the earthworks of a railway, or if there has been a subsidence or fall of an embankment from purely accidental causes, and the accident and its reparation have caused injury to an adjoining landowner, the claim for compensation seems to fall within the compensatory clause of the statute. "The damage resulting from the reparation of a mischief of this sort," observes the Lord Chancellor, "appears to me to be damage strictly arising from the carrying on of the works, and as much within the Lands' Clauses Consolidation Act as if it had occurred before the opening of the railway. I see no difference between the title to compensation of a person who has sustained loss by an unexpected land-slip, whether the accident happened before the line was opened, or two or three days, or two or three weeks, subsequently to that period" (*d*).

If, on the other hand, the subsequent injury results from negligence, or want of care and skill in the execution of the authorized works, or

(*b*) *Mortimer v. S. W. Rail. Co.*, 28 Law, J., Q. B. 129. *Corrigan v. Lond. & Bl. Rail. Co.*, 5 M. & Gr. 245.
(*c*) *In re Ware*, 9 Exch. 402; 7 Rail. Cas. 780. *Glover v. North Staff. Rail.*

Co., 16 Q. B. 648. *Lond. & North-West. Rail. Co. v. Bradley*, 3 Mac. & G. 336.
(*d*) *Lanc. & York. Rail. Co. v. Evans*, 15 Beav. 332.

from the doing of some wrongful and unauthorized act, the remedy is by action (e), for no compensation is given, as previously mentioned by s. 68 of the Lands' Clauses Consolidation Act, or, generally speaking, by any compensation clauses in statutes authorizing the commission of injurious acts, unless the injury is the natural and necessary result of the doing of the authorized act. If the act is a wrongful act notwithstanding the statute, the compensation clauses do not apply (f); and if the statutory remedy does not apply, an action for damages is, as we have seen, maintainable (g).

Of ascertaining the amount of statutory damage by arbitration.—Most of the acts of parliament authorizing the execution of public works which may be productive of injury to private individuals, direct compensation to be paid to all persons who have suffered injury from the execution of the authorized works, and direct the amount of compensation in certain cases, if the amount is disputed, to be referred to arbitration. The reference to arbitration is in many cases made compulsory, for if one party refuses to appoint an arbitrator the other may do so alone. But that is confined to disputes as to amount, and not to the question of liability to make compensation. If that is denied altogether, the question must be referred to the regular tribunals (h). An arbitrator has no jurisdiction to determine upon the question of liability, or any question of damage distinct from the damage naturally resulting from the exercise of the statutory powers, unless the parties mutually consent to refer such matters to him to decide upon (i).

The Public Health Act, 1848, s. 144, gives a right of full compensation to all persons sustaining damage by reason of the exercise of any of the powers of the act, and directs that in case of dispute as to the amount the same shall be settled by arbitration. Under the powers of this statute a local board made a sewer, and in so doing cut a trench through the claimant's land, and the local board contended that no damage had been thereby done to the claimant, but the claimant contended that he had sustained damage, and was entitled to compensation, and it was held that this clearly was a dispute as to the amount of compensation to be settled by arbitration, and that if the arbitrator found the damage nominal or infinitesimally small, he might find the amount of compensation to be nil (k). But when there is a dispute as to whether

(e) *Laurence v. Gt. Northern Rail. Co.*, 16 Q. B. 643. *Wilkes v. Hungerford Market Co.*, 2 Sc. 462, 463; 2 Bing. N. C. 281.

(f) *Broadbent v. Imp. Gas, &c. Co.*, 26 Law, J., Ch. 280.

(g) *Ante*, p. 531. *Blagrove v. Water-*

works, &c. Co., 1 Hurl. & Norm. 385.

(h) *Reg. v. Metrop. Com.* 1 El. & Bl. 702.

(i) *Re Byles*, *ante*, p. 570.

(k) *Bradby v. Southampt. Local Board of Health*, 4 Ell. & Bl. 1018.

the act complained of was done by the local board, or as to some matter of fact which would, if found for the local board, show that there was no liability to make compensation, then the dispute is not within the jurisdiction of the arbitrator.

*Damages recoverable before justices of the peace, and not by action.**

When an act of parliament authorizing the doing of an act which has been productive of injury to another provides that if the parties cannot agree upon the amount of compensation, the same shall be settled and ascertained by order of one or more justices of the peace, &c., the parties are confined to the specific remedy given by the statute, and have no choice of any other tribunal to settle the amends in any case within the act (l); but if the powers of the act have been exceeded, or the thing authorized to be done has been negligently or carelessly done, and the damage is the result of negligence, then an action for damages must be brought, and the matter is not within the cognizance of the statutory tribunal appointed for settling the amount of statutory compensation.

Whenever an act of parliament creates a pecuniary obligation, and gives a summary remedy for the enforcement of it, the particular remedy pointed out is in general the only one that can be adopted (m). Under the Towns' Improvement Clauses Act (10 & 11 Vict. c. 34), the Railway Clauses Consolidation Act (8 Vict. c. 20), the Metropolis Local Management Act (18 & 19 Vict. c. 120), and other statutes authorizing the construction of public works, it is provided that certain statutory expenses therein specified may be recovered as damages; and by other sections of these statutes it is provided, that when damages are to be paid they are to be ascertained before justices. These clauses creating the right and providing a specific remedy, impose upon the parties seeking to avail themselves of the provisions of the statute the obligation of following the particular remedy given, and no other (n), unless the statutory remedy does not extend to and cover the whole right (o).

Giving an appeal to the court of quarter sessions will not oust the Queen's courts of their jurisdiction (p).

(l) *Boyfield v. Porter*, 13 East. 208.

(m) *St. Pancras v. Batterbury*, 2 C. B., N. S., 486; 20 Law, J., C. P. 243.

(n) *Mayor, &c. of Blackburn v. Parkin-*

son, 28 Law, J., M. C. 7.

(o) *Shepherd v. Hills*, 11 Exch. 55.

(p) *Leader v. Moxon*, 2 W. Bl. 924; 3 Wils. 401.

CHAPTER XVI.

OF LIBEL AND SLANDER.

SECTION I.—*Of libel or written slander.*—

Of the distinction between slander by word of mouth and slander in a published writing—Oral slander rendered actionable by being printed and published—Exemption of the author and liability of the publisher—What writings are libellous and actionable—Evidence of malice—Privileged writings and communications—Defamatory proceedings in courts of justice—Defamatory petitions to the Queen, or to Parliament, or the ministers or officers of state—Criminatory communications made in discharge of a public or private duty—Privileged communications by parties specially interested in the subject-matter of the communication—Privileged communications respecting the character of servants—Comments in excess of the privilege—Effect of addressing privileged communications to the wrong party—Reports in newspapers of trials and proceedings preliminary thereto—

Reports of speeches in Parliament and at public meetings—Reviews and criticisms in public papers—Comments upon the public character of public men.

SECTION II.—*Of oral slander.*—Defamatory words not actionable without proof of special damage—Defamatory words actionable *per se*—Defamatory words concerning tradesmen and professional men—Proof of special damage—Loss of office and employment—Loss of custom—Unauthorized repetition of verbal slander—Privileged oral communications—Privileged charges and accusations of felony—Privileged proceedings before magistrates and judicial tribunals—Of the interpretation and application of slanderous words—Slander of title.

SECTION III.—*Of actions for libel and slander.*—Consolidation of actions—Parties, pleadings, defences, and evidence—Damages recoverable.

SECTION I.

OF LIBEL OR WRITTEN SLANDER.

Of the distinction between slander by word of mouth and slander in a published writing.—Slander in writing or in print has always been considered in our law a graver and more serious wrong and injury than slander by mere word of mouth, inasmuch as it is accompanied with greater coolness and deliberation, indicates greater malice, and is in general propagated wider and further than oral slander. Hence words of a depreciatory

character, which, if spoken only, would not be actionable, may become so by being put into writing or print and published. "There is a very material distinction," observes Gould, J.; "between libels and words. A libel is punishable both criminally and by action, when mere speaking the words would not be punishable in either way." For speaking the words "rogue" and "rascal" of any one, an action will not lie; but if these words were written and published of any one, an action would lie (*q*). Merely to call a man a swindler, or a cheat, or dishonest person by word of mouth, is not actionable (*r*), unless it be spoken of him in his trade or business, so as to have damaged him with his customers (*s*); but if such words are published in writing or printing, they are actionable per se (*t*). Verbal reflections upon the chastity of a young lady are not actionable, unless they have prevented her from marrying or have been accompanied by special damage; but if they are published in a newspaper, they are at once actionable, and substantial damages are recoverable (*u*).

Before, therefore, a person gives to oral calumny general notoriety, by circulating it in print, he must be prepared to prove its truth to the letter; for he has no more right to take away the character of the plaintiff, without being able to prove the truth of the charge that he has made against him, than he has to take his property without being able to justify the act by which he possessed himself of it. "Indeed," observes Best, C. J., "if we reflect on the degree of suffering occasioned by loss of character, and compare it with that occasioned by loss of property, the amount of the former injury far exceeds that of the latter" (*x*).

Oral slander rendered actionable by being printed and published—Exemption of the author and liability of the publisher.—Oral slander uttered under circumstances not rendering it actionable, may, therefore, become actionable by being printed and published, and the publisher may become responsible in damages for publishing and circulating in writing what would not be actionable so long as it was circulated only by word of mouth. In cases of this sort, the author who has spoken the words is exempt from all legal responsibility, while the man who prints them and circulates them in writing, and all who aid and assist therein, are liable to an action for damages (*y*).

The injury to character resulting from the publication of slanderous writings is considered to be of far greater consequence than that arising from the repetition of oral slander. "In the latter case, what has been

(*q*) *Villers v. Mousley*, 2 Wils. 403; 5 Co. 125 b.

(*r*) *Savile v. Jardine*, 2 H. Bl. 532.

(*s*) Bac. Abr. SLANDER, B.

(*t*) *Janson v. Stuart*, 1 T. R. 748.

(*u*) Christian's Bl. Com. 125 n. 6.

(*x*) *De Crepigny v. Wellesley*, 5 Bing. 406.

(*y*) *M'Gregor v. Thwaites*, 3 B. & C. 35. *Thorley v. Ld. Kerry*, 4 Taunt. 354.

said is known only to a few persons, and, if the statement be untrue, the imputation cast upon any one may be got rid of; the report is not heard of beyond the circle in which all the parties are known, and the veracity of the accuser, and the previous character of the accused, will be properly estimated. But if the report is to be spread over the world by means of the press, the malignant falsehoods of the vilest of mankind, which would not receive the least credit where the author is known, would make an impression which it would require much time and trouble to erase, and which it might be difficult, if not impossible, completely to remove." As to the question of the publisher of a libel being allowed to exonerate himself from the responsibility of the act by naming the author, "Of what use is it," observes Best, J., "to send the name of the author with a libel that is to pass into a part of the country where he is entirely unknown? The name of the author of a statement will not inform those who do not know his character, whether he is a person entitled to credit for veracity or not; whether his statement was made in earnest or by way of joke; whether it contains a charge made by a man of sound mind or the delusion of a lunatic" (z).

It is no defence, therefore, to an action for a libel, to show that a ludicrous narrative in a newspaper concerning the plaintiff was only a repetition of a story told by the plaintiff of himself; "for there is a great difference between a man's telling a ludicrous story of himself to a circle of his own acquaintance, and a publication of it to all the world through the medium of a newspaper" (a).

What writings are libellous and actionable.—All publications in writing or in print, imputing to another disgraceful, or fraudulent, or dishonest conduct (b), or which are injurious to the private character or credit of another, or tend to render a man ridiculous or contemptible in the relations of private life, are libellous, and an action for damages is maintainable against the writer and publisher, unless the publication ranges within that class of communications which are termed privileged communications, presently mentioned, or unless the libeller can prove the truth of the libel. To impute to a landlord that, in putting in a distress, he was colluding with an insolvent tenant, is libellous (c). It is a libel, also, to describe a man in writing as an "infernal villain" (d), or an "itchy old toad" (e), or as being in insolvent circumstances and unable to pay his debts (f), or

(z) *De Crespigny v. Wellesley*, 5 Bing. 403.

(a) *Cook v. Ward*, 6 Bing. 415.

(b) *Digby v. Thompson*, 4 B. & Ad. 891.

(c) *Haire v. Wilson*, 9 B. & C. 645.

(d) *Bell v. Stone*, 1 B. & P. 831.

(e) *Gould, J., Villers v. Mousley*, 2 Wils. 403.

(f) *Metrop. Saloon Om. Co. v. Hawkins*, 4 H. & N. 146; 28 Law, J., Exch. 201.

as being a mere man of straw (*g*), unfit to be trusted with money (*h*), or as being guilty of ingratitude to his friends and benefactors, or of misconduct in an office of trust, or of general misconduct, corruption, or neglect of duty in the management of business that has been intrusted to him to execute.

Every publication in writing, holding up a plaintiff to publick hatred, contempt, or ridicule, or having a tendency to make him feared, or his society shunned and avoided, is a libel. To publish in writing, therefore, of a man that he has been guilty of gross misconduct, and has insulted two females and a gentleman in the most barefaced manner, is a libel (*i*). It is a libel, also, to publish of a person soliciting relief from a charitable society, that she prefers unworthy claims, and that she has squandered away the funds of the benevolent in printing circulars abusive of the society's secretary (*k*); or to impute in writing to the captain of a ship that his ship is unseaworthy, as the imputation reflects upon the personal character and professional conduct of the captain. "It is like saying of an innkeeper or tea-dealer, that his wine or his tea is poisoned" (*l*). To impute to a physician of character and eminence that he is concerned in vending quack medicines is also libellous; and, therefore, if a vendor of pills falsely advertises his pills as being prepared and furnished by a physician in practice, without the authority of the latter, he is guilty of a libel upon the physician (*m*).

To publish falsely in placards or newspapers, or through the medium of letters or writings, of a publican, that his license has been refused (*n*), or of a tradesman, that he knowingly sells bad articles, or of a gunsmith or manufacturer, that he is a bad workman and unable to turn out a good gun or other article, is actionable; but mere puffs between rival tradesmen, the one depreciating the other's wares and exalting his own above them, are defensible (*o*). It is a libel also, to say in writing, of the publisher of a newspaper that he is a "libellous journalist," for the words either mean that the plaintiff has been habitually publishing libels in his paper, or that he has permitted them to be published from base and malicious motives. To show, therefore, that the plaintiff has been guilty, on one occasion only, of publishing a libel, is not enough to justify the use of the term "libellous journalist," but the evidence would go in mitigation of damages (*p*).

Where a man complains of a libel, written respecting an illegal trans-

(*g*) *Eaton v. Johns*, 1 Dowl. N. S. 612.

(*h*) *Cheese v. Scales*, 10 M. & W. 488.

(*i*) *Clement v. Chivis*, 9 B. & C. 176.

(*k*) *Hoare v. Silverlock*, 12 Q. B. 624.

(*l*) *Ingram v. Lawson*, 8 Sc. 478.

(*m*) *Clark v. Freeman*, 11 Beav. 117.

(*n*) *Blignell v. Buzzard*, 3 H. & N. 217; 27 Law. J., Exch. 355.

(*o*) *Harman v. Delany*, 2 Str. 898.

Evans v. Harlow, 5 Q. B. 624.

(*p*) *Wakley v. Cooke*, 4 Exch. 518.

action in which he is engaged, the illegality of that transaction is an answer to his complaint; but fraud ultra that transaction is not, on that account, to be imputed to him with impunity (*q*). If, therefore, a man is charged in writing with having cheated at dice, he is entitled to recover damages for the libel, although gambling and playing at dice are illegal (*r*).

Of the evidence of malice in actions for libel and defamation.—Malice is said to be the gist of an action for defamation or slander, but the word is not used in the popular sense, but in the sense the law puts upon the expression. In every case of ordinary libel, not being a privileged communication, the law implies malice from the very fact of the publication of the defamatory matter. “Malice in common acceptation,” observes Bayley, J., “means ill will against a person, but in its legal sense it means a wrongful act done intentionally without just cause or excuse. If I give a perfect stranger a blow likely to produce death, I do it of malice, because I do it intentionally, and without just cause or excuse. If I maim cattle without knowing whose they are, or if I poison a fishery without knowing the owner, I do it of malice, because it is a wrongful act done intentionally. And if I traduce a man, whether I know him or not, and whether I intend to do him an injury or not, the law considers it as done of malice, because it is wrongful and intentional. It equally works an injury whether I meant to produce an injury or not, and if I had no legal excuse for the slander, there shall be a remedy against me for the injury it produces. And the law recognizes the distinction between these two descriptions of malice,—malice in fact, and malice in law in actions of slander” (*s*).

Where, therefore, the circumstances under which the communication was made do not present any justifiable occasion for speaking or writing the defamatory matter, or show it to have been done either in pursuance of some duty, or for the purpose of endeavouring to enforce a right, the communication is deemed in law to be malicious; and the circumstance of the jury having negatived actual malice in such cases does not get rid of the effect of legal malice, and does not render the communication justifiable (*t*).

Privileged writings and communications.—When a communication is fairly made by one person to another in the discharge of some publick or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned, “the occasion,” observes

(*q*) *Best, C. J., Frisarri v. Clement*, 3 Bing. 441.

(*r*) *Greville v. Chapman*, 5 Q. B. 744.

(*s*) *Bromage v. Prosser*, 4 B. & C. 255.

(*t*) *Maule, J., Wenman v. Ash*, 13 C. B. 845.

Parke, B., "prevents the inference of malice, which the law draws from unauthorized communications, and affords a qualified defence, depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society, and the law has not restricted the right to make them within any narrow limits" (u). "The rule," observes Lord Campbell, "is, that if the occasion be such as repels the presumption of malice, the communication is privileged, and the plaintiff must then, if he can, give evidence of actual malice: if he gives no such evidence, it is the office of the judge to say that there is no question for the jury, and to direct a nonsuit or a verdict for the defendant; otherwise there might be a question for the jury in every case where a master, however fairly, gives the character of a servant; and if they conceived that there was malice lurking in the mind of the master, they might give a verdict for the plaintiff on the ground merely of the communication having taken place; and this would apply to all cases in which the occasion has been said to repel the presumption of malice" (x).

Whether the circumstances under which a communication was made constitute it a privileged communication or not is a question which the court has assumed the jurisdiction of determining. But if there is any dispute about those circumstances, the question must be submitted to a jury. It is essential to the existence of the privilege and protection that the communication, under whatever circumstances made, should be believed to be true by the party making it; for a person cannot shelter himself under the privilege if he believes the charge imputed untrue, unless he at the same time declares his belief of its untruth. If a man knowingly makes a false charge, there is at once actual malice, and the privilege is blown to the winds.

Defamatory proceedings in courts of justice.—An action for defamation will not lie for anything sworn or stated in the course of a judicial proceeding before a court of competent jurisdiction, such as defamatory bills or proceedings filed in chancery or in the ecclesiastical courts, or affidavits containing false and scandalous assertions against others (y). Therefore, if a man goes before justices of the peace and exhibits articles against the plaintiff containing divers false and scandalous charges concerning him, the plaintiff cannot have an action for a libel in respect of any matter contained in such articles, for the party preferring them

(u) *Toogood v. Spring*, 1 C. M. & R. 103. *Somerville v. Hawkins*, 10 C. B. 583.

(x) *Taylor v. Hawkins*, 16 Q. B. 321.

(y) *Ram v. Lamley*, Hutt. 113. *Weston v. Dobniet*, Cro. Jac. 432. *Astley v. Younge*, 2 Burr. 809.

"has pursued the ordinary course of justice in such a case; and if actions should be permitted in such cases, those who have just cause for complaint would not dare to complain, for fear of infinite vexation" (z). There is a large collection of cases where parties have from time to time attempted to get damages for slanderous and malicious charges contained in affidavits made in the course of a judicial proceeding, but in no one instance has the action been held to be maintainable (a); but the libeller may be punished, and the abuse repressed by a prosecution for perjury, the result of which is to make the libeller infamous if he is convicted.

Where the cause of action against a defendant was, that he falsely and maliciously, and without any reasonable or probable cause, went before a Commissioner for taking oaths in the Court of Chancery, and swore an affidavit stating of the defendant, in his character of an auctioneer, that he conducted his business fraudulently and improperly, and that he was not, in the deponent's opinion, a fit and proper person to be intrusted with the sale of certain property then the subject of a suit in the Court of Chancery, and the court, upon the evidence before it, decided that the plaintiff was not a fit and proper person to conduct the sale, it was held that the affidavit, being made in the course of a judicial proceeding, could form no ground of action (b). But if the court has no jurisdiction in the matter, and no right to entertain the proceeding, and the charge is recklessly and maliciously made, it will not be regarded as a privileged communication (c).

Defamatory petitions and complaints in writing to the Queen, the Parliament, the Lord Chancellor, or the Secretary of State, respecting the conduct of magistrates and publick officers, and officers in the army.—As all persons have an interest in the pure administration of publick justice, and as it is the duty of all persons who witness misconduct on the part of magistrates to try by all means in their power to bring such misconduct to the notice of those whose duty it is to inquire into and punish it, it has been held that petitions and memorials prepared *bond fide*, and forwarded to the proper authorities, complaining of the conduct of magistrates, and containing statements and allegations honestly believed to be true, are privileged communications;—but if they are made on frivolous grounds, or with knowledge of their being untrue, or without knowledge of their truth or falsehood, and without inquiry, when inquiry would have made the truth apparent, and would have shown the allegation of misconduct

(z) *Cutler v. Dixon*, 4 Co. 14 b.

(a) *Henderson v. Broomhead*, 4 H. & N. 579; 28 Law. J., Ex. 300; 7 W. R. 492; 33 Law. T. R. 312.

(b) *Revis v. Smith*, 18 C. B. 126; 25 Law. J., C. P. 195.

(c) *Buckley v. Wood*, 4 Co. 14 b. *Lewis v. Levy*, 27 Law. J., Q. B. 282.

false, the calumniator will be deemed to have acted from malicious motives, and his statements will not be privileged (*d*). Petitions to the king upon matters respecting which the crown cannot directly interfere, and petitions to parliament, although the petitioners, beside presenting them to the house, print them and distribute them amongst the members, fall within the same rule. All these are protected, that men may not be prevented by the dread of a prosecution or action from making communications which may be beneficial to the publick (*e*).

Defamatory statements respecting the conduct of publick officers, contained in an application for the redress of a grievance, or to expose some publick abuse made *bond fide* to one of the king's ministers, who is supposed to have authority to afford redress, do not render the party making the application liable to an action. Thus, where the creditor of an officer in the army sent a petition to the secretary-at-war, inclosing bills of exchange accepted by the officer, and containing statements derogatory to the character of the officer as a man of honour, and concluded with a prayer that the officer might be ordered to discharge the debts due on the bills, it was held, that although neither the secretary-at-war nor the king had power to order the money to be paid, yet that if the jury thought that the petition contained only an honest statement of facts, according to the understanding of the party who sent it, and that it was addressed to the secretary-at-war *bond fide* for the purpose of obtaining redress, and not for the purpose of slandering the plaintiff, they ought, under a plea of not guilty, to find a verdict for the defendant (*f*). "Inasmuch as the defendant," observes Maule, J., "might, reasonably enough, conceive that the publick officer to whom he addressed himself had power to assist him in obtaining payment of a just debt; the occasion justified the communication, however mistaken the defendant might be as to the extent of the jurisdiction of the person to whom he was addressing himself" (*g*). But if the secretary of state has no direct authority in respect of the matter complained of, and was not a competent tribunal to receive the application, the defendant is not exempt from responsibility (*h*).

Criminatory communications by publick officers acting in discharge of a publick duty.—A criminatory communication made by a clerk of the peace to the justices at quarter sessions is privileged, provided it is confined to a statement of facts pertinent to a matter which it is his duty to investigate, and contains nothing but what the clerk of the peace

(*d*) *Harrison v. Bush*, 5 Ell. & Bl. 354;
25 Law, J., Q. B. 25. *Sturt v. Blagg*, 10
Q. B. 906.

(*e*) *Lake v. King*, 1 Saund. 132.

(*f*) *Fairman v. Ives*, 5 B. & Ald. 644.

(*g*) *Wenman v. Ash*, 13 C. B. 845.

(*h*) *Blagg v. Sturt*, 10 Q. B. 905.

believes to be true; but if he imputes improper motives to others, and accuses them of attempts to extort money by misrepresentation; if irrelevant calumny is introduced into it, or it contains strictures upon the motives and conduct of others, which the facts stated do not warrant, he will exceed his privilege, and subject himself to an action for damages (i).

Criminatory pastoral letters, and printed communications from clergymen to their parishioners or members of their own congregations.—There is nothing in the position of a rector of a parish, or a vicar, curate, or any other minister of religion, which entitles him to publish or circulate defamatory letters in his parish, and such letters, though written and published under the gravest sense of duty, or the sincerest desire to improve the morals of the community, are actionable, if they cast serious imputations on the character or conduct of private persons. Where the schoolmaster of a national school, established in a parish of which the defendant was rector, had been dismissed by the trustees of the school from his situation, and had then obtained possession of a dissenting chapel, and opened a school there, it was held that the rector had no right to circulate letters in the parish injuriously reflecting upon the conduct of the schoolmaster and the tendency of his teaching, under the pretext that he was watching over the souls of his parishioners, and exerting himself for their spiritual welfare. The parson in this case had, in a pastoral letter to divers parishioners, stigmatized the schoolmaster as not being a rightly disposed Christian, as being imbued with a spirit of opposition to authority and the commands of Scripture, and designated his school as a schismatic school, upon which God's blessing could not rest; and he warned the rich against supporting it with subscriptions for money, and the poor against sending their children to it to be educated; and it was held that the libel was not privileged; and that there was evidence of malice for a jury. "What was there," observes Maule, J., "in the position of the defendant, as rector of the parish, which entitled him to circulate a defamatory letter, not only in his own, but in the adjoining parish, and so endeavour to prevent persons from subscribing and sending their children to the plaintiff's school? It is difficult to understand how the slightest right to do so can be suggested. As rector, he might, no doubt, visit and remonstrate with any of his flock; but when a meritorious individual is about to set up a school, of which he disapproves, because he thinks it may rival the school in which he takes an interest, that he should on that account cast serious imputations on that individual, and still be considered as having published a privileged communication, certainly seems a strange and inconvenient doctrine. We think that there was sufficient evidence

(i) *Cooke v. Wildes*, 5 Eil. & Bl. 340; 24 Law, J., Q. B. 367.

for the jury to infer malice, and that in determining the question of malice, the particular nature of the libel itself cannot be excluded from the consideration of the jury. Indeed, it would be absurd for the judge to say to the jury, 'I will tell you what the libel was—you cannot look at it for the purpose of determining the question of malice, but must consider the other facts given in evidence, without knowing anything whatever about the libel.' The absurdity of that shows that it cannot be law. In this case the terms of the letter itself are not without the character of malice. The endeavour to make the plaintiff's conduct a matter of spiritual delinquency; to represent it as something opposed not only to some worldly rule, but unchristian-like, and contrary to what would be done by a person who had faith in, and a willingness to obey, scriptural precepts, are matters on the face of the libel which make it proper that the jury, looking at the libel itself, should say whether or not there was actual malice" (j).

Defamatory letters respecting clergymen, addressed to the bishop of the diocese, will be privileged, if there was fair and reasonable cause for a resort to the bishop, but not if they were written on light and frivolous grounds. Where a parishioner wrote a letter to the bishop of the diocese, informing him of reports current in the parish derogatory to the character of the clergyman, and throwing scandal upon the Church, and praying that an inquiry might be instituted, it was left to the jury to determine whether the letter was written with the malicious intention of slandering the plaintiff to the bishop, and giving currency to idle rumours, or with the honest intention of obtaining an inquiry (k). If the writer of the letter has means at hand for ascertaining whether the rumours are true or false, and neglects to avail himself of them, and chooses to remain in ignorance when he might have obtained full information, there would be no pretence for any claim of privilege.

Privileged confidential communications between relations respecting the character of a party who has made an offer of marriage to a member of the family.—Where the defendant, being the son-in-law of a widow lady, to whom the plaintiff was paying his addresses, wrote a letter to the lady charging the plaintiff with various acts of gross misconduct, and warned her against listening to his addresses, it was held that the communication was privileged. "If no explanation," observes Alderson, B., "had been given of the circumstances under which the letter was written, the law would, from the contents, infer it to have been published with a malicious motive against the plaintiff. But when it is shown that the parties were

(j) *Gilpin v. Fowler*, 9 Exch. 627; 23 Law, J., Exch. 152.

(k) *James v. Boston*, 2 C. & K. 8.

standing in circumstances of confidence and near relationship towards each other, I think the defendant's conduct justifiable, if he really believed in the truth of the statements which he made, though such statements were, in fact, erroneous, for it is for the common good of all that communications between parties situated as these were should be free and unrestrained. The whole question is, whether this is a *bonâ fide* letter" (1).

Privileged confidential communications between friends to prevent an injury.—If a confidential communication is honestly made between friends, purely to prevent an injury, and not for the purpose of slandering, the occasion justifies the act, and the communication is privileged (m). But no moral duty will justify the repetition and communication in writing of all the idle gossip a man hears to the prejudice of his neighbour. If a party is, under certain circumstances, under the pressure of a moral obligation to disclose the truth, he is, under all circumstances, under the pressure of a moral obligation to abstain from circulating and propagating falsehoods. No person, therefore, ought to hazard statements or assertions in writing injurious to the character of another, until he has by inquiry, where the means of inquiry exist, satisfied himself that they are founded in truth. The benefit to one man by the disclosure of the information, supposing it to be true, is counterbalanced by the injury done to another if it should turn out to be false.

Where the defendant had received a letter from his friend, the mate of a ship, containing a long narrative of dangers which the mate had incurred from the drunkenness of the captain, and asking for the defendant's advice, and the defendant, honestly believing in the truth of his friend's statement, handed the letter to the shipowner, who dismissed the captain, and the latter sued the defendant for damages, the court were equally divided in opinion as to whether the communication was privileged or not; Tindal, C. J., and Erle, J., being of opinion that the occasion and circumstances under which the communication took place, and the purity of motive of the defendant in making it, rendered it a privileged and protected communication, while Cresswell, J., and Coltman, J., were of a contrary opinion. "It was not contended," observes Cresswell, J., "that any legal duty bound the defendant to communicate to the shipowner the contents of the letter he had received, nor was the communication made in the conduct of his own affairs, nor was his interest concerned. The authority for the publication, if any, must therefore be derived from some moral duty, publick or private, which it was incumbent upon him to discharge. I think it impossible to say that the defendant was called upon

(1) *Todd v. Hawkins*, 2 Mood. & Rob. 21.

(m) *Holroyd, J., Fairman v. Ives*, 5 B. & Ald. 645.

by any public duty to make the communication; neither his own situation, nor that of any of the parties concerned, nor the interests at stake, were such as affect the public weal. Was there any private duty? There was no relation of principal and agent between the shipowner and the defendant; nor was any trust or confidence reposed by the former in the latter: there was no relationship or intimacy between them; no inquiries had been made; they were, until the time in question, strangers; and the duty, if it existed at all, as between them, must, therefore, have arisen from the mere circumstance of their being fellow-subjects of the realm. But the same relation existed between the plaintiff and the defendant. If the property of the shipowner on the one hand was at stake, the character of the captain was at stake on the other; and I cannot but think that the moral duty, not to publish defamatory matter which he did not know to be true, was quite as strong as the duty to communicate to the shipowner that which he believed to be true" (n). Here, however, the defendant had no means of ascertaining the truth or falsehood of the information, and the responsibility of acting upon it, without due inquiry, ought to rest with the shipowner. And if the defendant had been possessed of any personal interest in the subject-matter to which the letter related; if he had been a part owner of the ship, or an underwriter on the ship, or had any property on board, the communication of the letter to the shipowner would have fallen clearly within the rule relating to excusable publications; and so, if the danger disclosed by the letter either to the ship or the cargo, or the ship's company, had been so immediate as that the disclosure to the shipowner was necessary to avert such danger, then, upon the ground of social duty, by which every man is bound to his neighbour, the defendant would have been not only justified in making, but would have been bound to make, the disclosure (o).

Privileged communications by parties having a pecuniary interest involved in the matter of the communication.—A communication made by a person immediately concerned in interest in the subject-matter to which it relates for the purpose of protecting his own interest, in the full belief that the communication is true, and without any malicious motive, is a privileged communication, and protected from liability in an action for libel. Where a letter was written confidentially to certain bankers, conveying charges injurious to the professional character of a solicitor in the management of certain concerns which they had intrusted to him, and it appeared that the writer of the letter was himself interested in the affairs which he supposed to be mismanaged, and wrote the letter *bonâ fide* under the impression that

(n) Cresswell, J., *Coxhead v. Richards*,
 2 C. B. 805. *Bennett v. Deacon*, ib. 633.

2 C. B. 593. *Wilson v. Robinson*, 7 Q. B.
 68.

(o) Tindal, C. J., *Coxhead v. Richards*,

his statements were well founded, it was held that the communication was privileged. "If a communication of this sort," observes Lord Ellenborough, "which was not meant to go beyond those immediately interested in it, were the subject of an action for damages, it would be impossible for the affairs of mankind to be conducted" (p).

Among the various communications which have been held to be protected in consideration of the private interest of the party making them may be enumerated, notices of the commission of an act of bankruptcy by the plaintiff, given by a creditor whose pecuniary interests required the information to be given (q), and communications respecting the character of servants (post, p. 589).

Reckless and inconsiderate communications.—But it is not sufficient in every case of a confidential communication made by a party having an interest in the subject-matter thereof, to show that it was made *bond fide* and without malice. A man has no right, as we have seen, to make himself the medium of propagating scandalous and defamatory accusations, unless he himself honestly believes them to be true, and his belief is not an honest belief if it is formed in a reckless and inconsiderate manner. If he has the means by inquiry of ascertaining whether the charge is true or false, and neglects to make inquiry, and exercises no effort to arrive at the truth, his belief can hardly be said to be an honest belief; for whoever publishes and circulates in writing opinions and statements unfavourable to another, ought to be prepared to show that he had some reasonable ground for it. There is a wide distinction between reckless assertions made by a man who assumes to have a knowledge of the facts he communicates, and honest communications made with a view to inquiry and information by a party interested in knowing the truth (r). If a question is asked concerning the character of another, the party interrogated is not justified in giving a damaging answer, unless he has some fair and reasonable foundation for it.

Disclosures made bond fide in the course of an investigation set on foot by the plaintiff himself are also privileged and protected. If, therefore, the plaintiff, or another party at the plaintiff's request, writes to the defendant asking for information on some point affecting the plaintiff's character, and the defendant merely relates what he has heard, the communication is privileged (s).

Communications between subscribers to charities.—Words spoken by one subscriber to a charity in answer to inquiries by another subscriber respecting the conduct of a medical man employed by the charity, in his

(p) *M'Dougall v. Claridge*, 1 Campb. 266.

(q) *Blackham v. Pugh*, 2 C. B. 611.

(r) *James v. Boston*, 2 Car. & K. 7.

(s) *Hopwood v. Thorn*, 8 C. B. 316.

attendance upon the objects of the charity, are not merely on account of those circumstances a privileged communication. "There may be a thousand subscribers to a charity," observes Lord Denman. "Such a claim of privilege is too large" (t).

Privileged communications respecting the character of servants.—One of the most ordinary and common instances of the application in practice of the privilege of protection to confidential communications of a criminatory character, is that of a former master giving the character of a discharged servant, which, if given with honesty of purpose to a party who has any interest in the inquiry, is a privileged communication, although made in the presence and hearing of a stranger (u). Even though the statement be untrue in fact, the master will be held justified by the occasion in making the statement, unless it can be shown to have proceeded from a malicious mind. Malice may be established by various proofs: one may be that the statement is false to the knowledge of the party making it, and if there is any evidence of wilful untruth in the statements as to character, there is evidence of malice to be submitted to a jury. "Generally speaking, anything said or written by a master when he gives the character of a servant is a privileged communication, if made *bond fide* in answer to inquiries that have been addressed to him. It is not essential that the party making the communication should be put into action in consequence of a third party's putting questions to him. He may, when he thinks that another is about to take into his service one whom he knows ought not to be taken, set himself in motion to induce that other to seek information and put questions to him. The answers to such questions given *bond fide*, with the intention of communicating such facts as the other party ought to know, will, although they contain slanderous matter, come within the scope of a privileged communication. But in such a case it will be a question for the jury whether the defendant has acted *bond fide*, intending honestly to discharge a duty, or whether he has acted maliciously, intending to do an injury to the servant. When he volunteers to give the character, stronger evidence that he acted *bond fide* will be required than in the case where he has given the character after being required so to do (x).

If the employer has received credible information of the misconduct of a servant after the latter had left his situation, it is his duty to disclose the fact in answer to inquiries as to character, in order that a proper investigation may be made by parties interested in knowing the truth (y). If a good character is given to a servant, and then circumstances are

(t) *Martin v. Strong*, 5 Ad. & E. 538.

(u) *Toogood v. Spyring*, 1 C. M. & R.

(x) *Pullison v. Jones*, 8 B. & C. 578.

(y) *Child v. Affleck*, 9 B. & C. 403.

discovered which show that the character was not deserved, it is the duty of the party who has given the good character to communicate the discovery to the person to whom such character has been given, and the communication, if made *bonâ fide*, is privileged and protected (z). But if it appear from the terms and language of the communication and the surrounding circumstances of the case that there was any malicious or spiteful feeling actuating the master when making the communication, then it is not protected. If, therefore, it be proved that the bad character given to the servant is false, and that the master knew it at the time he gave it, there is evidence of express malice, and the privilege is annihilated. If the master characterizes his servant as "a bad-tempered, lazy, impertinent fellow," and the servant brings forward persons with whom he has previously lived who give him a good character, and contradict the allegation of his bad temper, laziness, and impertinence, it is incumbent on the master to give some general evidence, showing that he had a reasonable ground for using the language he did use, and that the statement was not totally unfounded and wholly devoid of truth. If he fails to give some general evidence of this sort, the charge against the servant will be considered reckless and unfounded, and there will be evidence of malice for a jury. "Unquestionably," observes Lord Alvanley, C. J., "the master who has given a bad character of a servant to persons inquiring after his character, is not bound to substantiate by proof what he has said; but it is equally clear that the servant may, if he can, prove the character to be false; and the question between the master and the servant will always in such case be, whether what the former has spoken of the latter be malicious and defamatory" (a).

Where the defendant having been asked for the character of her governess, and why she parted with her, stated that it was "on account of her incompetency, and not being ladylike nor good-tempered," and it was shown that the governess had served the defendant above a year in that capacity, and had been twice favourably recommended by her during that year to other persons for a situation as governess, and general evidence was given of her competency, good temper, and ladylike manners by witnesses who were her personal friends, it was held that this evidence required some answer on the part of the defendant, and that in the absence of any evidence of the incompetency, bad manners, or bad temper of the governess, there was proof of malice for the jury. "If," observes Patteson, J., "the plaintiff makes out a *prima facie* case of malice, it certainly lies on the defendant to answer it. When it is said that he must prove the truth of his statement, it is not meant in the sense of

(z) *Gardner v. Slade*, 18 Q. B. 801.(a) *Rogers v. Clifton*, 3 B. & P. 591.

truth absolutely; but he must show that the assertion was made with an honest belief of its being the truth " (b).

Where a libel imputed to the plaintiff incompetency and unskilfulness in a particular transaction in which the plaintiff had been employed by the defendant, it was held that it was not competent to the plaintiff to give evidence of general competency and skilfulness, without meeting the specific instance relied upon by the plaintiff (c).

Where the plaintiff, being secretary of an association called the Brewers' Company, was dismissed for alleged misconduct, and the defendant, who was a director of the company, and also a director of another company, called the London Necropolis Company, of which the plaintiff was auditor, called the attention of the directors of the last-named company to the plaintiff's misconduct and dismissal from the secretaryship of the other company, alleging that he had been charged with obtaining money from the solicitors of the company by false pretences, and taking up a bill of his own with it, it was held that the defendant might properly, in his character of director of the Necropolis Company, make the communication he did, although it charged the plaintiff with the actual commission of the offence imputed to him, or amounted to an assertion on the defendant's part that he believed the charges to be true; for it was both his duty and interest to make the communication; and it was held that, in order to render the defendant liable in damages, actual malice must be shown, in the shape of proof that the defendant was not actuated by a justifiable motive, but by some evil intention towards the plaintiff (d).

Where the defendant, having given notice of dismissal to his footman and cook, they separately went to him and asked his reason for discharging them, when he told each, in the absence of the other, that (he or she) was discharged because both had been robbing him; whereupon each brought an action for the words so spoken to the other, it was held that the statement was privileged (e).

Comments in excess of the privilege.—"The proper meaning of a privileged communication," observes Parke, B., "is only this, that the occasion on which the communication was made rebuts the inference of malice *prima facie*, arising from a statement prejudicial to the character of the plaintiff, and puts it on him to prove that there was malice in fact, *i. e.* that the defendant was actuated by motives of personal spite or ill-will, independent of the occasion on which the communication was made" (f). This may be established by the language of the communication itself, by showing that it was made in virulent and abusive terms, and that the

(b) *Fountain v. Boodle*, 3 Q. B. 11.

(c) *Brine v. Bazalgette*, 3 Exch. 694.

(d) *Harris v. Thompson*, 13 C. B. 348.

(e) *Manby v. Witt*, 18 C. B. 544.

(f) *Wright v. Woodgate*, 2 Cr. M. & R.

577.

words used were stronger than the occasion justified. When the communication is in writing, the jury are entitled to look at and read the writing, in order to judge of its true character.

"Any one, in the transaction of business with another, has a right to use language, *bonâ fide*, which is relevant to that business, and which a due regard to his own interest makes necessary, even if it should directly, or by its consequences, be injurious or painful to another; but he has no right to make defamatory comments on the motives or conduct of the party with whom he is dealing." Where, therefore, the defendant claimed a sum of money from the plaintiff, and the plaintiff's clerk wrote, by direction of the plaintiff, to the defendant, telling him that the plaintiff denied his liability, whereupon the defendant wrote to the clerk, alleging facts in support of his claim, and added, "this attempt to defraud me is as mean as it is dishonest," it was held that the comment was not privileged, and was libellous and actionable (g).

Of the effect of addressing privileged communications to a wrong party by mistake.—It does not appear to have been expressly decided, whether an honest mistake, made in sending a privileged communication to the wrong person, destroys the privilege, and subjects the party making the communication to an action; or how it would be if a gentleman, asked by letter for the character of a servant, should, *bonâ fide*, write an answer, stating acts of dishonesty and immorality committed by the servant, and, by mistake, address the letter to another person, different from the inquirer, although of the same name (h).

Publication of trials in courts of justice containing defamatory matter.—“Newspapers and other publications,” observes Tindal, C. J., “which narrate what passes in courts of justice, are, to a certain extent, privileged. No one can read their accounts of judicial proceedings without being sensible that, on several occasions, they do, to a certain extent, serve the cause of publick justice. They ought therefore to be privileged, but their privilege must be restrained to occasions in which they publish fairly what passes in court. Everybody knows that the statement of counsel is *ex parte*, and that he is often instructed to make allegations which it is afterwards impossible to support in proof. If, therefore, after a cause has been tried, a defamatory statement by counsel, which the evidence has not at all supported, is published in a newspaper, the publication is not privileged, because it is not a fair account of what passed in court” (i). The cases in which reports of legal proceedings, whether *ex parte* or not, have

(g) *Tuson v. Evans*, 12 Ad. & E. 733.

(h) *Harrison v. Bush*, 5 Ell. & Bl. 350.

(i) *Saunders v. Mills*, 6 Bing. 218.

Houré v. Silverlock, 9 C. B. 20; 19 Law,

J., C. P. 215. *Beauchamps (Ld.) v. Croft*,
Dyer, 285 a. *Curry v. Wailes*, 1 B. & P.
525.

been held to be libellous and actionable are, where the account published has been false or highly coloured, or where the reporter has added comments, allegations, and opinions of his own, reflecting upon the character or conduct of others (*k*), or where the matters given in evidence and published are of a grossly scandalous, blasphemous, or immoral character (*l*).

Publications of ex-parte statements and of proceedings preliminary to a trial.—"We are not prepared," observes Lord Campbell in a recent case, "to lay down for law, that the publication of preliminary inquiries before magistrates is universally lawful, nor that the publication of such inquiries is universally unlawful. One of the resolutions of this court, in *Duncan v. Thwaites* (*m*), lays down the doctrine that the report of a preliminary examination before a magistrate is unlawful, where the party accused has been committed or held to bail for an indictable offence; there the actual pendency of a prosecution was a main ingredient in the decision: but where the party accused has neither been committed nor held to bail, but absolved by the magistrate, we think we are at liberty to hold that an impartial and correct report of the proceedings is lawful. In the cases relied upon to establish the general doctrine that reports of preliminary proceedings before magistrates are not lawful, it will be seen that there were either vituperative comments accompanying the statement of the evidence, or some aggravation attending the publication of the report, or some peril which was likely to be caused to the person complaining of it" (*n*).

The privilege is not confined to the publication of the proceedings of the superior courts. The dignity of the court cannot be regarded, and "no distinction can be made for this purpose between a court of pie poudre and the House of Lords."

A magistrate, upon any preliminary inquiry respecting an indictable offence, may, if he thinks fit, carry on the inquiry in private, and the publication of any such proceedings before him would undoubtedly be unlawful; but while he continues to sit foribus apertis, admitting into the room where he sits as many of the public as can be conveniently accommodated, and thinking that this course is best calculated for the investigation of truth and the satisfactory administration of justice (as in most cases it certainly will be), the court in which he sits is to be considered a public court of justice, provided the magistrate has jurisdiction over the matters brought before him, and authority to inquire into them. But "if magistrates publickly hear

(*k*) *Stiles v. Nokes*, 7 East. 492. *Lewis v. Clement*, 3 B. & Ald. 710. *Andrews v. Chapman*, 3 C. & K. 288.

(*l*) *Rex v. Cartile*, 3 B. & Ald. 169.

(*m*) 3 B. & C. 556.

(*n*) *Ld. Campbell, Lewis v. Levy*, 27 Law, J., Q. B. 289.

slandrous complaints respecting matters over which they have no jurisdiction, a report of what passes before them is as little privileged as if they were illiterate mechanics assembled in an ale-house" (o).

Publication of speeches and proceedings in parliament.—Information printed merely for the use of members of parliament and circulated amongst them is privileged, but writings containing defamatory matter, though printed for the use of members, cannot lawfully be circulated amongst those who are not members of parliament (p). A member of parliament may make what reflections he pleases upon the character of others from his place in the House of Commons, but if he prints and publishes his speeches he will be responsible in damages if they are of a libellous character (q).

Defamatory reports of proceedings at public meetings.—The principle which protects newspaper proprietors and others, who publish a fair and correct statement of what takes place in courts of justice, does not extend to protect the publication of what is said at public meetings, or meetings of commissioners appointed to be holden by statute for public purposes. "At such meetings," observes Lord Campbell, "things may be said very relevant to the subject in hand, but very calumnious; and in what an unhappy situation the calumniated person would be, if the calumny might be published, and yet he could not bring an action and challenge the printer and publisher of the libel to prove its truth" (r).

Reviews and written criticisms upon authors.—"Every man," observes Lord Ellenborough, "who publishes a book, commits himself to the judgment of the publick, and any one may comment upon his performance. If the commentator does not step aside from the work, or introduce fiction for the purpose of condemnation, he exercises a fair and legitimate right; but if he follows the author into domestic life for the purpose of slander, that will be libellous. Authors are liable to criticism, to exposure, and even to ridicule, if their compositions are ridiculous, otherwise the first who writes a book upon any subject will maintain a monopoly of sentiment and of opinion respecting it, which would tend to the perpetuity of error." "The critic does a great service to the public who writes down any vapid or useless publication, such as ought never to have appeared. He checks the dissemination of bad taste, and prevents people from wasting both their time and their money upon trash. I speak of fair and candid criticism, and this every one has a right to publish, although the author may suffer a loss from it. Such a loss the law does not consider an injury,

(o) Ib. 288. *M'Gregor v. Thwaites*, 3 B. & C. 24.

(p) *Stockdale v. Hansard*, 9 Ad. & E. 1.

(q) *Rex v. Creevey*, 1 M. & S. 280.

Rex v. Ld. Abingdon, 1 Esp. 226; cited 26 Law, J., Q. B. 107; 7 Ell. & Bl. 233.

(r) *Davison v. Duncan*, 7 Ell. & Bl. 231; 26 Law, J., Q. B. 106.

because it is a loss which the party ought to sustain. It is the loss of fame and profit to which he was never entitled" (s).

"The editor of a publick newspaper," observes Lord Kenyon, "may fairly and candidly comment on any place or species of publick entertainment, but it must be done without malice or view to injure or prejudice the proprietor in the eyes of the publick. If fairly done, however severe the censure, the justice of it screens the editor from legal animadversion; but if it can be proved that the comment is malevolent, and exceeds the bounds of fair opinion, then it is a libel and actionable," (t).

Criticisms by one publick journalist upon another.—It is competent to one publick writer to criticise another and ridicule his sentiments and opinions, but he is not justified in making calumnious remarks on the private character of the individual, or imputing to him base and dishonourable conduct. In that respect, the editor of a newspaper enjoys a right of protection in common with every other subject (u). A paragraph in one newspaper, charging another with being a vulgar, ignorant, and scurrilous journal, is not actionable; but it is otherwise if it asserts that it is in low circulation; and calls the attention of advertisers to the fact, as the plain object of it is to damage the sale of the paper, and diminish the profits from advertising (x).

Works of art are as much the subjects of criticism as the writings of an author. "Any man has a right," observes Lord Tenterden, "to express his opinion of them; and however mistaken, in point of taste, that opinion may be, or however unfavourable to the merits of the author or artist, the person entertaining it is not precluded by law from its fair, reasonable, and temperate expression, although through the medium of ridicule. If it is unfair and intemperate, and written for the purpose of injuring the artist in his profession, it is actionable" (y).

Criticisms upon sermons.—The law permits comments to be made upon the sermons delivered by clergymen from their pulpits, provided the comments are fairly, justly, and truly made. A clergyman also may be fairly characterized as a remarkably bad preacher, or as a preacher of erroneous doctrines, and if the parson sustains an injury from the criticism, it is injury for which there is no redress at law by damages. But all reflections upon the private character or private conduct of the clergyman, calculated to bring him into disrepute with his parishioners, is libellous and actionable. The preaching of a sermon in the ordinary mode of a clergyman's duty in the parish church does not make the sermon publick property, so

(s) *Carr v. Hood*, cited in *Tabart v. 2 Stark. 97.*
Tipper, 1 Campb. 357.

(t) *Dibdin v. Swan*, 1 Esp. 26.

(u) *Ld. Ellenborough, Stuart v. Lovell*,

(x) *Heriot v. Stuart*, 1 Esp. 436.

(y) *Soane v. Knight*, 1 M. & M. 74.

as to invite observation upon it, and authorize the same freedom of criticism and comment from the press in general, as is extended to the publication of a literary work (z).

Comments upon the publick character of publick men.—There is a wide difference between publications relating to publick and private individuals. Every subject has a right to comment upon those acts of publick men which concern him as a subject of the realm, if he do not make his commentary a vehicle for malice and the indulgence of some private spite or pique. “You have a right to comment on the publick acts of a minister, upon the publick acts of a general, upon the publick judgments of a judge, upon the publick skill of an actor, but you have no right to impute to them such conduct as disgraces and dishonours them in private life” (a).

SECTION II.

OF VERBAL SLANDER.

When defamatory words are actionable.—The old cases respecting the liability of parties for the utterance of verbal slander are of the most unsatisfactory and contradictory character. “They are,” observes Pratt, C. J., “very odd cases” (b). At one period the courts seem to have regarded actions for slander, by word of mouth, with great disfavour, and to have done all they could to discourage them; at another time they favoured the action, because men’s tongues were growing more and more virulent and dangerous, and people were apt to take the law into their own hands, and revenge themselves on the slanderer if they failed to obtain redress in a court of justice (c). In some cases we find judges complaining of the growth of actions for verbal slander, saying that they would spoil all communications between man and man, and repress all expression of opinion, so that one would be afraid to speak disparagingly of the accommodation afforded by a particular inn, or of the wine sold therein, or of the surveys furnished by a particular surveyor (d). At another period we find judges lamenting the frequency of scandals and

(z) *Gathercole v. Miall*, 15 M. & W. 344. *Hearne v. Stowell*, 12 Ad. & E. 719.
(a) *Parmiter v. Coupland*, 6 M. & W. 108.

(b) *Button v. Heyward*, 8 Mod. 24.
(c) *Harrison v. Thornborough*, 10 Mod. 108.
(d) *King v. Lake*, 2 Ventr. 28. *Crofts v. Brown*, 3 Bulstr. 167.

the license given to the tongue of the slanderer, and expressing their surprise that cases are to be found in the books in which a clergyman failed to obtain compensation in damages for an imputation of adultery (e), and that a schoolmistress had been declared incompetent to maintain an action for verbal charges of prostitution (f).

"The opinions of later times," observes Holt, C. J., "have been in many instances different from those of former days in relation to actions for words, and judgments have gone different ways. These actions for words are scrambling things, that have gone backwards and forwards. And I have heard my Lord Hale and Justice Twisden say, that they knew no set rule for actions for words, but that all words stood upon their own feet. It is not worth while to be learned on the subject, but for my part, wherever words tend to take away a man's reputation, I will encourage such actions, because so doing will contribute much to the preservation of the peace" (g).

Defamatory words not actionable without special damage.—As the law at present stands, mere vituperation and abuse by word of mouth, however gross, is not actionable, unless it is spoken of a professional man or tradesman in the conduct of his profession or business. Thus, to call a man a scoundrel, or blackguard, or a swindler, or a rogue, or to say of a man, "You are a fellow, a disgrace to the town, and unfit for decent society, on account of your conduct with whores," is not actionable (h). Neither is it actionable to call a man a blackleg, unless it be shown that by the use of the term the defendant intended to impute to the plaintiff that he is a cheating gambler (i). Words imputing to a lady that she gets her living by imposture and prostitution, and that she is a swindler, are not actionable without special damage (k); nor the words, "He is a rogue, and has robbed and cheated his brother-in-law of upwards of 2000*l.*" (l).

Defamatory words actionable per se without proof of any special damage.—But words imputing an indictable offence are actionable *per se* without proof of any special damage, as they render the accused party liable to the pains and penalties of the criminal law; such as words imputing bigamy (m), forgery, the receipt of stolen goods, knowing them to be stolen (n); the careless or unskilful administration of mercury, or any other

(e) *Parrot v. Carpenter*, Cro. Eliz. 502; Noy. 64.

(f) Per Twisden, J., *Wharton v. Brook*, 1 Ventr. 21. *Wilby v. Elston*, 8 C. B. 142. Ld. Denman, C. J., *Ayre v. Craven*, 2 Ad. & E. 7.

(g) *Baker v. Pierce*, 6 Mod. 24. Fortescue, J., *Button v. Heyward*, 8 Mod. 24.

(h) *Lumby v. Allday*, 1 Cr. & Jerv. 301. *Savile v. Jardine*, 2 H. Bl. 531.

(i) *Barnett v. Allen*, 3 H. & N. 376; 27 Law, J., Exch. 412.

(k) *Wilby v. Elston*, 8 C. B. 142.

(l) *Hopwood v. Thorn*, ib. 313.

(m) *Heming v. Power*, 10 M. & W. 570.

(n) *Alfred v. Farlow*, 8 Q. B. 854.

poisonous or dangerous drug, and thereby causing death (*o*); the keeping of a bawdy-house (*p*), or the doing of any other criminal or indictable offence. But words conveying only a vague sort of suspicion in the mind of the speaker (*q*); uttered *bond fide* with a view of obtaining information, or by way of warning, or spoken in grief and sorrow, for the news (*r*) will not create any cause of action, as the circumstances rebut the presumption of malice; nor any words of mere suspicion or opinion, which do not convey any positive imputation of guilt (*s*); but if a man says of another, "I am thoroughly convinced you are guilty of stealing, &c. &c.," this is equivalent to a positive averment of the fact (*t*).

Defamatory words imputing to the plaintiff that he is afflicted with a contagious disorder are actionable *per se*. Thus, to say seriously and positively of a person that he has got the leprosy, or the pox, is actionable, without proof of any special damage, because it causes him to be shunned and avoided by society (*u*). The imputation must refer to the time present, and not the time past, for words are not actionable which merely impute to the plaintiff that at some previous period he had the disease (*x*).

Defamatory words concerning tradesmen and professional men, spoken of them in the way of their trade or profession, will sustain an action when such words would not be actionable when spoken of a person having no trade or profession (*y*). Words imputing to a tradesman fraudulent conduct in the transaction of business, such as the use of false weights, are actionable *per se*, without proof of special damage (*z*); and so are words imputing to a tradesman that he is in the constant habit of cheating and defrauding his customers, and those who deal with him (*a*), and words imputing bankruptcy or insolvency to a person engaged in trade, such as "if he does not come and make terms with me, I will make a bankrupt of him, and ruin him" (*b*).

But "if one tradesman will pretend to be a greater artist than others, it is lawful for them to support their own credit in the same way;" and, consequently, it is not actionable for one tradesman to depreciate the wares and merchandize of another in comparison with his own. So long as it is a mere puff by one of two rival tradesmen, recom-

(*o*) *Edsall v. Russell*, 5 Sc. N. R. 801.

(*p*) *Brayne v. Cooper*, 5 M. & W. 250.

(*q*) *Tozer v. Mashford*, 6 Exch. 539.

(*r*) *Crawford v. Middleton*, 1 Lev. 82.

(*s*) Com. Dig. Action on the case for defamation. F. 13.

(*t*) *Peake v. Oldham*, Cowp. 275.

(*u*) *Bloodworth v. Gray*, 7 M. & Gr. 334; 8 Sc. N. R. 9. *James v. Rutledge*, 4 Rep. 17 b.

(*x*) *Carslake v. Mapledoram*, 2 T. R. 475.

(*y*) Per Cur. *Harman v. Delany*, 2 Str. 898.

(*z*) *Griffiths v. Lewis*, 7 Q. B. 65.

(*a*) *Reeve v. Holgate*, 2 Lev. 62.

(*b*) *Brown v. Smith*, 13 C. B. 599. *Ld. Denman, C. J., Robinson v. Marchant*, 7 Q. B. 918.

mending his own articles in preference to those of another, it is defensible on account of the interest the defendant has in the matter; but to say generally of a tradesman that he is in the habit of selling goods which he knows to be bad, is actionable (c).

Words imputing misconduct, or gross ignorance or incapacity, to professional men in the discharge of their professional duties, are actionable per se, without proof of any special damage; such as words imputing to a practising physician that he is a quack and a mountebank (d), or that he has killed a patient through ignorance of the first principles of his profession (e); or words imputing to a surgeon or accoucheur the want of a proper qualification for his profession or business, or the want of skill, or of any professional requisite, or that his character is so bad amongst his professional brethren that they will not meet him (f); but words conveying an imputation against a medical man not necessarily connected with his profession, such as a general imputation of adultery, are not actionable (g); but if the statement be, that he has seduced or committed adultery with one of his patients, it would be otherwise.

Words imputing to a barrister that he has wilfully and corruptly deceived his client, and revealed the secrets of his cause, or that he has given vexatious counsel, and seeks only to fill his own pockets, without regard to the interests of his clients, are actionable (h); and so are words imputing to a practising attorney that he is well known to be a corrupt man, and to deal corruptly in his profession (i); or words imputing to him that he betrays the secrets of his clients, or that he is ignorant of his profession, and is no lawyer, and that fools only go to him for law, or that he is guilty of mal-practice, or is a cheat, a rogne, or a knave in his profession (k). But mere vituperative language or general abuse of a professional man is not actionable, unless it has reference to his conduct in his profession. Thus, to call an attorney a cheating knave is not actionable, but to say that he cheats his clients is actionable (l). In all actions founded on words imputing to a professional man conduct which disgraces and injures him in his profession, it must be averred and proved that the plaintiff was in the exercise and practice of his profession at the time of the utterance of the slander; for if he has ceased to exercise his profession or employment at the time the words are spoken, the words

(c) *Evans v. Harlow*, 5 Q. B. 633.

(d) *Goddart v. Haselfoot*, 1 Roll. Abr. 54.

(e) *Tutty v. Alewin*, 11 Mod. 221.

(f) *Southee v. Denny*, 1 Exch. 196.

(g) *Ayre v. Craven*, 2 Ad. & E. 2.

(h) *Snag v. Gray*, 1 Roll. Abr. 57.

King v. Lake, 2 Vent. 28.

(i) *Birchley's case*, 4 Rep. 16 a; pl. 6.

(k) *Banks v. Allen*, 1 Roll. Abr. 54.

Baker v. Morfue, Sid. 327. *Day v. Buller*, 3 Wils. 59.

(l) *Alleston v. Moor*, Het. 167.

are not actionable, on the ground that they were spoken of him in his profession (*m*).

To say of a beneficed clergyman that he is drunk in church, or that he preaches false doctrine, lies, and malice, and ought to be degraded (*n*), or that he is an old rogue, and a contemptible fellow, hated and despised by his parishioners (*o*), or that he has preached a seditious sermon, and has moved the people to sedition (*p*), is actionable: words also imputing fraudulent and dishonest conduct to a beneficed clergyman in some clerical matter (*q*), or accusing him of incontinence, or the preaching of false doctrine, are actionable, as they tend to injure him in his professional character, and, if true, to subject him to a deprivation of his benefice, and to a degradation of orders, and, consequently, to a loss of temporal emolument. But if at the time of the speaking of the words the plaintiff is not beneficed, and is not in the actual receipt of professional beneficial emolument as a preacher, lecturer, curate, or the like, there is no actual damage, and an action for slander is not maintainable. "If the plaintiff be in orders merely, and not in possession of any temporal advantage, as having professional occupation, the only remedy appears to be in the Ecclesiastical Court" (*r*). And whenever the words imply only general abuse, and do not affect the plaintiff in his professional and clerical character, they are not actionable without proof of special damage (*s*).

Words imputing official misconduct to a person in an office of profit or trust are actionable *per se*. Thus, to say publicly of a man who is in the enjoyment of an office of honour, profit, or trust, that he is wanting in integrity in his office, or that he habitually neglects his official duties, or that he is a corrupt man and takes bribes, is actionable; but if the words merely impute to him want of ability and general unfitness for his post, the words are not actionable without proof of special damage (*t*). Whenever words are sought to be made actionable on the ground that they were spoken of a man in office, it must be shown that they were spoken of him in his character or conduct in his office, and that they impute to him the want of some qualification for, or misconduct in, his office; for if they impute to him only general misconduct and unfitness for his situation, they will fail to support an action, without proof of special damage (*u*).

(*m*) *Bellamy v. Burch*, 18 M. & W. 590.

(*n*) *Dodd v. Robinson*, Ayleyn, 63.
Cranden v. Walden, 3 Lev. 17; 1 Roll.
Abr. 58.

(*o*) *Musgrave v. Rovey*, Str. 948.

(*p*) *Brittridge's case*, 4 Co. 19 b.

(*q*) *Pemberton v. Colls*, 11 Q. B. 461;
16 Law, J., Q. B. 403.

(*r*) *Gallurey v. Marshall*, 9 Exch. 295;
23 Law, J., Exch. 78.

(*s*) *Pemberton v. Colls*, 10 Q. B. 473
16 Law, J., Q. B. 403.

(*t*) *BAC. ABR. SLANDER, B.*

(*u*) *Lumby v. Allday*, 1 Cr. & J. 301.
Hopwood v. Thorn, 8 C. B. 313.

Words rendered actionable by reason of special damage.—If any special damage has been sustained by the plaintiff by reason of the utterance of slanderous words, an action for damages is then maintainable. Thus to say of a spinster that she is in the family way, or that she has had a child, is not *per se* actionable; but if the girl is about to be married, and she loses her marriage in consequence of the utterance of the slander, a very grave cause of action arises (*x*). If, in consequence of the utterance of slanderous words by the defendant, the plaintiff has lost a situation, or been refused employment, there is special damage resulting from the wrongful act, capable of maintaining an action. Thus, where the plaintiff was chaplain to a peer, and the defendant falsely alleged of him that he had had a bastard, whereby he lost the chaplainship, it was held that the plaintiff was entitled to maintain an action for compensation in damages on the ground that the chaplainship was a temporal preferment (*y*).

Slanderous denunciations from the pulpit.—If a priest or clergyman, or minister of any religious denomination, singles out any particular member of his congregation, and denounces him for misconduct in his trade or profession, or in the execution of any office of trust, or if he defames him generally, and slanders him in the face of the congregation whereby he loses a situation, or is dismissed from his employment, and sustains special damage, the priest or clergyman will be answerable in damages, if he cannot prove the truth of the charge he makes; for no minister of religion has a right to propagate slander under the guise of disseminating religious truth or repressing vice (*z*). Where the plaintiff, in his declaration of his cause of action, set forth that he was a parishioner of S—, and that the defendant being the vicar there, and intending to scandalize the plaintiff, and bring him into bad repute with his neighbours, and cause them to shun his company, did, in the time of divine service, in the church, in the hearing of the parishioners, maliciously pronounce the plaintiff excommunicated, by virtue of a certain instrument of excommunication, alleged to have been received by him from the ordinary, whereas the defendant had received no such instrument, nor was the plaintiff excommunicated, by which means the plaintiff was scandalized and prevented from going to church, and was put to great trouble and expense in showing his innocence, &c., it was held that the declaration disclosed a good cause of action (*a*).

Effect of a dismissal of a slandered servant, being a wrongful dismissal on the part of the master who dismisses in consequence of the slander.—Where

(*x*) *Davis v. Gardiner*, 4 Co. 16 b, pl. 11.

(*y*) *Payne v. Beaumont*, 1 Lev. 248.

(*z*) *Gilpin v. Fowler*, 9 Exch. 625; 23

Law, J., Exch. 152.

(*a*) *Barnabas v. Traunter*, Mich. 16

Car. B. R., 1 Vin. Abr. 390.

the plaintiff had been hired by his master by the year, and his master wrongfully dismissed him, in consequence of some slanders respecting him, circulated by the defendant, which were not actionable without special damage, it was held that, as the dismissal was a wrongful act on the part of the master, for which he was answerable in damages to the plaintiff, there was no special damage resulting to the plaintiff capable of sustaining an action against the defendant. "The supposed special damage," observes Lawrence, J., "was the loss of the advantages to which the plaintiff was entitled under his contract with his master; but he could not be considered in law as having lost them, for he still had a right to claim them of his master, who, without a sufficient cause, had refused to continue the plaintiff in his service." "The special damage," further observes Lord Ellenborough, "must be the legal and natural consequence of the words spoken, and here it is an illegal consequence: a mere wrongful act of the master, for which the defendant was no more answerable than if, in consequence of the words, other persons had afterwards assembled and seized the plaintiff, and thrown him into a horse-pond, by way of punishment for his supposed transgression" (b).

Effect of the slander being disbelieved by the master, who dismisses the slandered servant.—If the dismissal of the servant has been caused by the utterance of the slander against him, the special damage results from the slander, so as to render an action maintainable, although the master did not believe in the slander, and did not dismiss the servant, because he thought him guilty of the charge made against him, or considered him untrustworthy. Thus, where the plaintiff set forth that she was a straw-bonnet-maker, in the employ of a Mrs. Enoch, and that the defendant, who was the landlord, came to her mistress, and told her that the plaintiff tapped at the windows, and conducted herself shamefully and disgracefully, so that the house looked like a bawdy-house, and Mrs. Enoch dismissed the plaintiff, but stated in her evidence that she did not dismiss her because she believed what the defendant told her, but because he was her landlord, and she was afraid he would be offended if she did not send the plaintiff away after what he had said; it was held that the dismissal was the consequence of the slanderous words, and that damages were recoverable in respect thereof, although the mistress, to whom the slander was uttered, did not believe it (c).

Special damage, not being the immediate and natural consequence of the words spoken, and not rendering the words actionable—*Spontaneous and unauthorized repetition of verbal slander.*—Whenever proof of special damage is

(b) *Vicars v. Wilcocks*, 8 East. 8.

(c) *Knight v. Gibbs*, 1 Ad. & E. 40.

necessary to maintain an action of slander, it must appear that the special damage is the immediate and natural consequence of the words spoken (*d*). If, therefore, the use of slanderous words by the defendant, not actionable *per se*, would have wholly failed to produce any injurious consequence, unless aided by the act of another, the injury resulting from that act of the other is not to be ascribed to the defendant. A spontaneous and unauthorized repetition of slanderous words, is not the necessary consequence of the original uttering of the words; and the original utterer, therefore, is not responsible in damages for the subsequent repetition of the slander by persons who had no authority from him to repeat what he had said. Thus, where the substance of the plaintiff's allegation of special damage was, that by reason of the defendant's false representations to divers persons, one John Bryer refused to trust the plaintiff, and the evidence was, that the words were addressed to one Edward Bryce, and that Bryce, at a subsequent time and place, and without any authority from the defendant, repeated the representations to Bryer, so that the repetition of the words, and not the original statement, occasioned the plaintiff's damage, it was held that the action was not maintainable. "Every man," observes Tindal, C. J., "must be taken to be answerable for the necessary consequences of his own wrongful acts; but such a spontaneous and unauthorized communication cannot be considered as the necessary consequence of the original uttering of the words, for no effect whatever followed from the first speaking of the words to Bryce. If he had kept them to himself, Bryer would still have trusted the plaintiff. It was the repetition of them by Bryce to Bryer, which was the voluntary act of a free agent, over whom the defendant had no control, and for whose acts he is not answerable, that was the immediate cause of the plaintiff's damage. We therefore think that, as each count in the declaration alleges as the only grievance the original false speaking of the words, the allegation that, 'by reason of the committing of such grievance, Bryer refused to give the plaintiff credit,' is not made out by the evidence" (*e*).

But where the utterer of the slander directs it to be repeated in any particular quarter, or mentions it to a person whose known duty it is to repeat it, he is responsible for the repetition of it. It is then his act, and is the natural and necessary result of the utterance of the words (*f*).

Special damage directly resulting from the repetition of oral slander.—Whenever loss of situation, or employment, or any other special damage is the direct consequence of the utterance of oral slander, the utterer is

(*d*) *Vicars v. Wilcocks*, 8 East. 3.

(*f*) *Kendillon v. Malby*, Car. & M.

(*e*) *Ward v. Weeks*, 4 M. & P. 808; 7 Bing. 211.

responsible, whether he is himself the original author of the scandal, or whether he merely repeats what he has heard some one else say. A man cannot by law justify the repetition of slander by merely naming the person who first uttered it; he must also show that he repeated it on a justifiable occasion, and believed it to be true. "As great an injury may accrue from the wrongful repetition as from the first publication or utterance of slander. The person who repeats it may give greater weight to the calumny, and may be actuated by greater malice than the original utterer" (g).

Circumstances rebutting the presumption of malice.—If the circumstances connected with the utterance of the words rebut the presumption of malice, there is no cause of action. Thus, where the plaintiff brought an action against one for falsely and maliciously saying of him that he had heard he was hanged for stealing a horse, and on the evidence it appeared that the words were spoken in grief and sorrow for the news, Hobart, J., caused the plaintiff to be non-suited, for it was not said maliciously (h). We have seen that there is a wide difference between statements made with a view to inquiry and information by parties seeking to ascertain the truth, and who profess to know nothing themselves upon the subject of their inquiry, and statements made by persons who profess to have information, and to communicate that information to another. But a person cannot shelter himself from the consequences of having made a slanderous imputation upon a man's character by saying that he did not volunteer the statement, but made it honestly, believing it to be true, in answer to a question that was put to him (i).

Privileged communications by word of mouth—Proof of malice.—We have already seen that many communications and statements of a slanderous character are privileged, either on the ground that they have been made in the course of a judicial proceeding (ante, p. 581), or in discharge of some public or private duty, or by parties having some pecuniary or family interest in the subject-matter of the communication (ante, pp. 585–588), or that the communication was made in answer to inquiries respecting the character of a servant (ante, pp. 589–592), and that the occasion and circumstances repel the presumption of malice. Thus we have seen, that an action for slander is not maintainable against a defendant for charging the plaintiff with felony before a magistrate (k); nor against witnesses in a court of justice for false and scandalous statements made by them whilst giving their evidence upon oath (l); nor by a servant

(g) *McPherson v. Daniels*, 10 B. & C. 273. *Tidman v. Ainslie*, 10 Exch. 63.

(h) *Crawford v. Middleton*, 1 Lev. 82.

(i) *Griffiths v. Lewis*, 7 Q. B. 64.

(k) *Ram v. Lamley*, Hutt. 113; ante, pp. 581, 582.

(l) *Revis v. Smith*, 18 C. B. 120; 25 Law, J., C. P. 105.

against his former master for defamatory words spoken by the latter in giving the character of such servant (*m*).

Where the plaintiff proved that he had been in the service of the defendant, and had been dismissed on a charge of theft, that he afterwards came to the defendant's and had some communication with the defendant's servants, when the defendant said to them, "I have dismissed that man for robbing me; do not speak to him any more in publick or in private, or I shall think you as bad as him;" it was held, that the verbal statement being honestly made by a master as a warning to his servants was a privileged communication, and that it was incumbent on the plaintiff to give some evidence of malice in order to raise a question for the jury (*n*). And where a vestry meeting was held for the purpose of nominating and electing constables, and hearing and deciding upon any objections that might be brought forward against any of the candidates for the office, and the defendant, a ratepayer, made a statement imputing perjury to the plaintiff, who was one of the candidates, and said that he was a person not to be believed on his oath, it was held that the statement was privileged and protected if it was *bonâ fide* and honestly made in full belief of its truth, and that it was incumbent on the plaintiff to bring forward evidence of his general character for truthfulness in order to raise the question as to whether the defendant in making the statement had been actuated by any malicious motive (*o*). But although a man who makes a charge against another may be justified by the occasion in making it, yet he may make the charge in such a way, accompanied by such expressions and under such circumstances, as furnish proof that it was made maliciously (*p*).

Privileged charges of felony made bonâ fide, with reasonable grounds for suspicion.—For the sake of publick justice, charges and communications which would otherwise be slanderous, are protected if *bonâ fide* made in the prosecution of an inquiry into a suspected crime. "It is argued," observes Coleridge, J., "that the charges ought to be true, or ought to be made only before an officer of justice. But the exigencies of society could never permit such a restriction. If I stop a party suspected, must I not say why I do so? The presence of other parties would not do away with the privilege." It is for the jury to say whether the circumstances warranted the charge made by the defendant, whether it was made *bonâ fide*, or before more persons than was necessary, or in language stronger than the occasion justified (*q*).

(*m*) *Weatherston v. Hawkins*, 1 T. R. 110.

(*n*) *Somerville v. Hawkins*, 10 C. B. 590.

(*o*) *Kershaw v. Bailey*, 1 Exch. 743.

(*p*) *Senior v. Medland*, 4 Jur. N. S. 1039.

(*q*) *Padmore v. Lawrence*, 11 Ad. & E. 382.

Defamatory statements by a party in open court conducting his own cause are privileged and protected, if they are relevant to the subject-matter of inquiry, or are spoken during the heat and excitement of a trial. "The party himself," observes Holroyd, J., "from his comparative ignorance of what is and what is not relevant, may be indulged in a greater latitude, and not be restricted within the same limits as a counsel, whose superior knowledge should be sufficient to restrain him within due bounds" (r).

Defamatory statements and comments by barristers in the course of judicial proceedings, or in the conduct of a cause.—"If a counsel speaks scandalous words against one in defending his client's cause, an action lies not against him for so doing; for it is his duty to speak for his client, and it shall be intended to be spoken according to his client's instructions" (s). The freedom of speech at the bar is the privilege of the client vested in the counsel who represents him. It would be impossible properly to conduct a cause in court unless considerable latitude were allowed to the advocate, and if any evil follow therefrom, it must be endured for the sake of the greater good which attends it. "A counsellor, therefore, hath a privilege to enforce anything which is informed unto him for his client and to give it in evidence, it being pertinent to the matter in question, and not to examine whether it be true or false" (t). It is pertinent to the cause for counsel to comment both on the facts proved and on those which he might expect to prove, and may indulge freely in any calumnious imputation which the facts before the court, whether true or false, appear to warrant. "It would be impossible," observes Abbott, J., "that justice could be well administered if counsel were to be questioned for the too great strength of their expressions; but they ought not to avail themselves of their situation maliciously to utter words wholly unjustifiable. Where, therefore, an attorney was mixed up in the concoction of a pretended cause of action, and in suing for a sum of money when he knew that there was no legal claim and that the action must fail, and the counsel of the defendant said that the action was founded in the knavery of the attorney, that it was one of the most profligate things ever done by a professional man, and that the attorney was a fraudulent and wicked attorney, it was held that these observations and expressions of opinion were privileged. "Perhaps," observes Lord Ellenborough, "the words were too strong, and, in the exercise of a candour fit to be adopted, might have been spared. But still a counsel might, *bond fide*, think the expressions justifiable under the circumstances" (u).

(r) *Hodgson v. Scarlett*, 1 B. & Ald. 244; Roll. Abr. 87, pl. 4. *Revis v. Smith*, 18 C. B. 126; 25 Law, J., C. P. 195.

(s) *Wood v. Gunstone*, Styles, 402.

(t) *Brook v. Sir H. Montague*, Cro. Jac. 90.

(u) *Hodgson v. Scarlett*, 1 B. & Ald. 241.

Defamatory observations and charges by magistrates in the exercise of the duties of their office.—We have already seen that judges are not responsible for slanderous words spoken by them concerning private individuals, if the words are material and relevant to the cause or matter in issue before them. But no judge of an inferior court or magistrate has any immunity for slander; and if he goes out of his way to calumniate an individual by uttering charges wholly irrelevant to the matter in issue before him, and not warranted by the occasion, he will be answerable in damages if malice be clearly made out, and there is a want of reasonable and probable cause for the slanderous observations. But it is clearly within the sphere of the duty of magistrates to make such comments upon the conduct and demeanour of witnesses and parties coming before them, and upon the character of persons whose conduct is involved in the inquiry before them as the occasion seems to them to warrant, and they are entitled to express their opinions concerning them with the utmost freedom, however erroneous those opinions may be (x), provided the proceedings before them are within their jurisdiction, and they have authority to inquire into and adjudicate upon them. But if a magistrate has no jurisdiction to hear and determine a particular matter brought before him, and he, nevertheless, proceeds to hear it, and in so doing makes libellous charges and imputations upon others, he will be responsible in damages for the wrong done.

Of the interpretation and application of the words used.—"In former times," observes Pratt, C. J., "words were construed in mitiori sensu, to avoid vexatious actions, which were then very frequent; but distinguenda sunt tempora, and we ought to expound words according to their general signification to prevent scandals, which are at present too frequent" (y). "The rule," observes Lord Ellenborough, "which at one time prevailed, that words are to be understood in mitiori sensu, has been long ago superseded; and words are now construed by courts as they always ought to have been, in the plain, popular sense in which the rest of the world naturally understand them" (z). The effect of the words used, and not the meaning of the party uttering them, is the test of their being actionable. "You must first ascertain the meaning of the words themselves, and then give them the effect any reasonable bystander would affix to them" (a).

Slander of title.—If lands or chattels are about to be sold by auction, and a man declares in the auction-room, or elsewhere, that the vendor's

(x) *Kendillon v. Maltby*, 2 Moo. & Rob. 438. *Allardice v. Robertson*, 1 Dow. N. S. 514.

(y) *Button v. Heyward*, 8 Mod. 24.

(z) *Roberts v. Camden*, 9 East. 96. *Woolnoth v. Meadows*, 5 East. 468.

(a) *Hankinson v. Bilby*, 16 M. & W. 442.

title is defective, that the lands are mortgaged, or that the chattels are stolen property, and so deters people from buying, or causes the property to be sold for a less price than it would otherwise have realized, this is a slander upon the title of the owner, and gives the latter a claim for compensation, in damages unless the slanderer can prove the truth of his statement (b). "An action for slander of title," observes Tindal, C. J., "is not properly an action for words spoken, or for a libel written and published; but an action on the case for special damage, sustained by reason of the speaking or publication of the slander of the plaintiff's title. It is ranged under that division of actions in the Digests, and by other writers on the text law." The plaintiff, therefore, in order to sustain the action, must prove special damage, and there must be an express allegation on the face of the declaration of some particular damage resulting to the plaintiff from the slander. Where, therefore, a shareholder in a mining company complained of a paragraph in a newspaper, asserting that a bill had been filed in Chancery invalidating his title to his shares, whereby he was injured in his rights and his shares were depreciated in the market, and he was prevented from selling them, it was held that this was not such an allegation of special damage as the law required in such actions; and that the necessity for an allegation of special damage does not in anywise depend upon the medium through which the slander is disseminated: that is, whether it be through words, or writing, or print (c). "To support the action," observes Parke, B., "it ought to be shown that the false statement was made *malâ fide*, and that the special damage ensues therefrom. If some portions of the statement are *bonâ fide*, the injured party cannot recover, unless he can distinctly trace the damage as resulting from that part which is *malâ fide*" (d).

To enable a party, moreover, to maintain an action for slander of title, there must be malice, either express or implied, and the words spoken must go to defeat the plaintiff's title. If the words are spoken by a stranger, who has no right or business to interfere, the law presumes malice; and if he cannot show the truth of his assertion he is responsible in damages: but if he is himself interested in the matter, and announces the defect of title *bonâ fide*, either for the purpose of protecting his own interest or preventing the commission of a fraud, the legal presumption of malice is rebutted (e), and the plaintiff must then show that there was no reasonable or probable ground for the statement. If the alleged slanderer of title is himself interested, or has fair and reasonable ground for believing himself to be interested, in the sale or disposition of the

(b) *Gutsole v. Mathers*, 1 M. & W. 501.

(c) *Malachy v. Soper*, 3 Sc. 737-739.

(d) *Brook v. Rawl*, 4 Exch. 524.

(e) *Hargrave v. Le Breton*, 4 Burr. 2423. *Smith v. Spooner*, 3 Taunt. 253.

property, the title to which is alleged to be slandered, and has acted *bonâ fide*, though under the influence of prejudice or misconception, he is not responsible in damages unless it be shown that he must have known that there was not the slightest pretence for his interference. "The *bona fides* of the communication," observes Lord Ellenborough, "and not whether a man of rational understanding would have made it, is the question to be canvassed" (*f*).

"Slander of title," observes Maule, J., "ordinarily means a statement of something tending to cut down the extent of title, which is injurious only if it is false. It is essential to give a cause of action that the statement should be false, and therefore its falsehood is given in evidence under Not guilty, since the new rules. It is essential also that it should be malicious; not, as Lord Ellenborough observes, malicious in the worst sense, but with intent to injure the plaintiff. If the statement be true—if there really be the infirmity of title that is suggested, no action will lie, however malicious the defendant's intention might be. The jury may infer malice from the absence of probable cause, but they are not bound to do so. The want of probable cause does not necessarily lead to an inference of malice, neither does the existence of probable cause afford any answer to the action" (*g*).

SECTION III.

OF ACTIONS FOR LIBEL AND SLANDER.

Consolidation of actions for the same libel.—Where seven different actions were brought against the same defendant, for seven different publications of the same libel to different persons, which might all have been comprised in one action, the court stayed the proceedings in all of them, except one, until that one had been tried (*h*).

Parties to be made plaintiffs.—The party to be made plaintiff in an action for libel or slander, is the person to whom the injury immediately accrues, and not the party indirectly or remotely affected by the libel. Where the plaintiff alleged that he had engaged Madame Mara to sing at his oratorio, and that the defendant published a libel concerning her, in

(*f*) *Pitt v. Donovan*, 1 M. & S. 648.

(*g*) *Pater v. Baker*, 3 C. B. 868.

(*h*) *Jones v. Pritchard*, 6 D. & L. 590;
18 Law, J., Q. B. 104.

consequence of which she was prevented from singing, from an apprehension of being hissed, whereby the plaintiff lost the benefit of her services, it was held that the injury complained of was too remote, and not to be connected with the cause assigned for it; that if the libel was injurious to Madame Mara she might have an action for it, but her refusing to perform might have proceeded from groundless apprehension or mere caprice, and not from the publication of the libel; and the plaintiff therefore was nonsuited (i).

An action of slander does not lie by two jointly against a defendant, when the tort which one received by the words spoken was not the tort which the other received; but they ought to sever in their actions, as in the case of false imprisonment (k). If, however, defamatory words be spoken of two partners in trade respecting them in their trade, they may maintain a joint action for the slander, averring special damage (l).

Parties to be made defendants.—Every publisher and disseminator of written slander is liable to an action for damages, as well as the original inventor, author, or utterer of the calumny. The person who repeats it may, as we have seen, give greater weight to the scandal, and may be actuated by greater malice than the original utterer, and he cannot discharge himself from responsibility by giving up the name of the author or first utterer of the slander. The party slandered may, consequently, maintain an action for damages arising from the publication of written slander against the author and first publisher of the slander, as well as against any subsequent publisher or disseminator thereof, unless the publication can be justified or excused (m). But in the case of verbal slander, where the action is maintainable only in respect of some special damage that has accrued from the utterance of the slander, the action must, as we have seen, be brought against the person whose wrongful act is the direct and immediate cause of the special damage. If, therefore, the damage immediately results from the wrongful repetition of the slander by a person to whom it was communicated, it is the repeater, and not the original utterer of the scandal, who is responsible for the special damage that has arisen from it, and on which special damage alone the action is founded (n).

A corporation aggregate may be made answerable for a libel published by its directions, although the body corporate had no ill-will to the plaintiff, and did not mean to injure him, for great injustice would be suffered

(i) *Ashley v. Harrison*, 1 Esp. 48.

(k) *Dyer*, 19 a.; *Burrough*, J., 10 Moore, 451.

(l) *Le Fanu v. Malcolmson*, 1 H. L. C. 637. *Cook v. Batchelor*, 3 B. & P. 150;

ante, pp. 415, 416; post, ch. 20.

(m) *McPherson v. Daniels*, 10 B. & C. 273. *Tidman v. Ainslie*, 10 Exch. 68.

(n) *Ward v. Weeks*, 4 M. & P. 807; 7 Bing. 211; ante, p. 577.

by individuals if their remedy for wrongs authorized by corporations aggregate were to be confined to the agents employed by them. Therefore, where the South-Eastern Railway Company falsely published through their electric telegraph that the Lewes Old Bank had stopped payment, it was held that the company was responsible in damages for the false and slanderous intelligence (*o*). Where the slander is made by two persons in a joint publication, such as an affidavit sworn by both, they may both be made defendants in one and the same action (*p*), but where slanderous words are spoken by two different persons, separate actions should be brought (*q*).

Declarations for libel and slander.—In every declaration for libel or slander, either by publication in writing or by words, the writing or the very words themselves must be set out on the face of the declaration, in order that it may be shown to the court that the words are capable of receiving the innuendo or interpretation put upon them, and of producing the injury which is charged to have resulted from them (*r*) ; and also that the defendant may know the certainty of the charge, and may be able to shape his defence either on the general issue or by plea of justification accordingly; and this defect is not cured by verdict (*s*). “Whenever the charge,” observes Holroyd, J., “arises out of the publication of a written instrument, the invariable rule is, that the instrument itself must be set out in the declaration, that the defendant may have an opportunity, if he pleases, of admitting all the facts charged, and of having the judgment of the court whether the facts stated amount to a cause of action ; for it is clear, that when it can be shown distinctly what the instrument is upon which the whole charge depends, that instrument must be shown to the court, in order that they may form their judgment upon it. A defendant is not bound to put the question as a combined question of law and fact to the jury, but has a right to put it as a mere question of law to the court. The setting out only the substance and effect of the writing would not only deprive the defendant of that advantage, but also of his writ of error ; and it would make the verdict of a jury binding in cases where it ought not to be so” (*t*).

In actions for slandering a man in his trade or profession, the declaration ought not merely to state that such scandalous conduct was imputed to the plaintiff in his profession, but ought also to show in what manner it was connected by the speaker with that profession (*u*).

(*o*) *Whitfield v. S. E. R. Co.*, 1 Ell. Bl. & Ell. 121 ; 27 Law, J., Q. B. 229.

(*p*) *Maitland v. Goldney*, 2 East. 426.

(*q*) *Chamberlain v. Goodwin*, Cro. Jac. 647.

Swithin v. Vincent, 2 Wils. 227.

(*r*) *Gutsole v. Mathers*, 1 M. & W. 503.

(*s*) *Cook v. Cox*, 3 M. & S. 116.

(*t*) *Wright v. Clements*, 3 B. & Ald. 509. *Wood v. Brown*, 6 Taunt. 169.

(*u*) *Ayre v. Craven*, 2 Ad. & E. 7. *James v. Brooker*, 9 Q. B. 13.

Of the innuendo or defamatory sense attributed to the writing or words on the face of the declaration.—By the statute 15 & 16 Vict. c. 76, s. 61, it is enacted, that in all actions for libel and slander the plaintiff shall be at liberty to aver in his declaration that the words or matter complained of were used in a defamatory sense, specifying such defamatory sense without any prefatory averment, to show how such words or matter were used in that sense, and such averment shall be put in issue by the denial of the alleged libel or slander; and where the words or matter set forth, with or without the alleged meaning, show a cause of action, the declaration is sufficient. The pleader, therefore, may put any construction he pleases upon the words, and it is for the jury to determine whether the construction is borne out by the evidence (x).

The forms of declaration in the schedule of the Common-law Procedure Act, 1852, merely set forth that "the defendant falsely and maliciously printed and published of the plaintiff, in a newspaper called, &c., the words following, that is to say, &c., meaning thereby," &c.; and, in cases of verbal slander, "that the defendant falsely and maliciously spoke and published of the plaintiff the words following, that is to say, he is a thief, whereby the plaintiff lost his situation as, &c., in the employ of," &c. Where the words, whether written or spoken, are susceptible of a harmless, but also of an injurious meaning, the injurious meaning must be set out as well as the words, and their true import and signification may be established by evidence of the surrounding circumstances (y). When the words are libellous in themselves, no innuendo to explain their meaning is required (z); if they are incapable of the interpretation put upon them the declaration is bad, and the court will, if necessary, arrest the judgment. It is not necessary to allege formally that the defendant published the libel, it is sufficient if the circumstances set forth show that the libel was, in point of fact, published (a).

Statement of special damage in actions for verbal slander.—When the words themselves are not actionable without proof of special damage, the nature of the special damage must be particularized and set forth, in order that the defendant may be enabled to meet the charge. If, by reason of the speaking of the words, the plaintiff has lost the society of friends and neighbours, and the substantial benefits arising from their hospitality, this temporal damage should be particularized, and the names of the neighbours and friends who have refused to receive the plaintiff into their houses, and entertain him at dinner, &c. should be specified (b). Where

(x) *Hemmings v. Gasson*, 1 Ell. Bl. & El. 346; 27 Law, J., Q. B. 253.

(y) *Griffiths v. Lewis*, 8 Q. B. 851. *Gallwey v. Marshall*, 9 Exch. 294; 23

Law, J., Exch. 78.

(z) *Barrett v. Long*, 3 H. L. C. 418.

(a) *Baldwin v. Elphinston*, 2 W. Bl. 1037.

(b) *Moore v. Meagher*, 1 Taunt. 39.

a single woman brought an action against the defendant for saying she was with child, and had miscarried, in consequence of which she lost several suitors, it was held that she ought to have specified the names of these suitors, as they were necessarily within her knowledge (c). And where a tradesman complained of a loss of custom as a consequence of the slander, and must have known who his customers were whom he had lost, he was required to state their names on the face of his declaration (d). But if the declaration alleges the special damage with as much certainty as the subject-matter is capable of, it is now sufficient. Thus, where the declaration alleged that the plaintiff, before the speaking of the scandalous words by the defendant, was employed to preach to a dissenting congregation at a certain licensed chapel, and that he derived considerable profit from his good character and preaching, and that by reason of the scandal of the defendant the persons frequenting the chapel had refused to permit him to preach there, and had discontinued giving him the profits which they would otherwise have given him, it was held that it was not necessary to state the names of the persons who, in consequence of the slander, discontinued giving the plaintiff the emoluments, and that it was sufficient to show that, in consequence of the slander, he was removed from his office, and lost the emoluments of it (e). And in an action for slander of the plaintiff in his business of an innkeeper or eating-house-keeper, it was held to be sufficient to allege and prove as special damage a general loss of custom from the slander, without stating the names of the customers who ceased to frequent the establishment, as the customers of an inn are travellers and persons passing to and fro, and it might be impossible for the plaintiff to ascertain their names, or the reason why they ceased to frequent the house (f).

What may be given in evidence under the plea of not guilty.—It is competent to the defendant under the general issue to show that the words were not spoken maliciously, by proving that they were spoken on an occasion or under circumstances which the law, on grounds of public policy, allows; as in the course of a parliamentary or judicial proceeding, or in giving the character of a servant (g). The plea of NOT GUILTY puts in issue the tendency of the alleged libel, and also the lawfulness of the occasion upon which it was published. The fact, therefore, that a libellous publication was a privileged communication may be given in evidence under this plea. It does not follow that a defence may not be given in evidence under “not guilty,” because it might also form the

(c) *Barnes v. Prudlin*, 1 Sid. 396.(d) *Fenn v. Dice*, 1 Roll. Abr. 58.(e) *Huntley v. Herring*, 8 T. R. 133.(f) *Evans v. Harries*, 1 H. & N. 251;
20 Law, J., Exch. 31.(g) *Littledale, J.*, 10 B. & C. 272.

subject of a special plea (*h*). In an action for slander of the plaintiff in his office, profession, or trade, the plea of NOT GUILTY will operate in denial of speaking the words, or speaking them maliciously, and in the defamatory sense imputed, and with reference to the plaintiff's office, profession, or trade, but it will not operate as a denial of the fact of the plaintiff's holding the office or being of the profession or trade alleged (*i*). It puts in issue the infliction of the wrong in the mode described, and the special damage, where that is substantially the thing complained of.

When the substance of the charge in the declaration is, that the defendant has inflicted injury upon the plaintiff by the speaking of disparaging words, not actionable in themselves, but forming a ground of action, by reason of special damage having arisen from the utterance of them, the plea of not guilty puts in issue all the facts creating the special damage; for without those facts, and without the special damage, there is no wrong of which the plaintiff has any reason to complain (*k*). Where the words are actionable themselves without special damage, a traverse of the allegation of the special damage is immaterial and unnecessary. In such a case, if the plaintiff proves his special damage he will recover it; if he fails in proving it, he may still resort to and recover his general damages. A finding upon it, therefore, one way or the other, will have no effect as to the right to the verdict (*l*). A plea to the damage only is bad, unless the damage is so essentially the cause of action that without it the action could not be maintained (*m*).

If a shareholder in a public company has published letters or writings imputing insolvency to the company, he may, under the plea of not guilty, show that he was actuated by a desire to protect the interests of the shareholders, and had reasonable ground for making the imputation (*n*).

Plea that the libel was inserted without malice or gross negligence, and that an apology was published—*Payment of money into court.*—By 6 & 7 Vict. c. 96, s. 2, it is enacted, that in any action for a libel contained in any public newspaper, or other periodical publication, it shall be competent to the defendant to plead that the libel was inserted without actual malice, and without gross negligence, and that before the commencement of the action, or at the earliest opportunity afterwards, the defendant inserted in such newspaper, or other periodical publication, a full apology for the libel; or if the newspaper or periodical publication is published

(*h*) *Lillie v. Price*, 5 Ad. & E. 645.
Hoare v. Silverlock, 9 C. B. 28. *Lewis v. Levy*, 27 Law, J., Q. B. 287.

(*i*) Reg. Gen. 16 Vict., 1 Ell. & Bl. App. lxxxi.

(*k*) *Wilby v. Elston*, 8 C. B. 149.
Norton v. Scholefield, 9 M. & W. 665.

(*l*) *Smith v. Thomas*, 2 Sc. 546; 2 Bing. N. C. 372. *Wyatt v. Gore*, Holt, N. P. C. n.

(*m*) *Robinson v. Marchant*, 7 Q. B. 918.

(*n*) *Metrop. Saloon Om. Co. v. Hawkins*, 4 H. & N. 151; 28 Law, J., Exch. 201.

at intervals exceeding a week, that he had offered to publish the apology in any newspaper or periodical publication, to be selected by the plaintiff; and that every defendant shall, upon filing such plea, be at liberty to pay into court a sum of money by way of amends for the injury sustained (o). To entitle the defendant to the benefit of an apology under this statute, the apology should be printed in such a part of the paper, and in such a type, as will be likely to ensure its perusal by the persons who read the libel, or by all who read the paper (p).

When the general issue is pleaded, and also a plea denying actual malice, and stating the publication of an apology set forth in the plea, the publication of previous libels on the plaintiff by the defendant is admissible in evidence, to show that the defendant wrote the libel in question with actual malice. A long practice of libelling the plaintiff may show in the most satisfactory manner that the defendant was actuated by malice in the particular publication, and that it did not take place through carelessness or inadvertence; and the more the evidence approaches to the proof of a systematic practice, the more convincing it is. The circumstance that the other libels are more or less frequent, or more or less remote from the time of the publication of the libel in question, merely affects the weight, not the admissibility, of the evidence (q).

Plea of justification.—To enable the plaintiff to give the truth of the charge or imputation in evidence as a defence to the action, the defendant must plead a plea of justification, alleging that the plaintiff did the act imputed to him by the libel, and that the defendant therefore published or spoke the words of which the plaintiff complains (r). Every plea of justification must meet and justify the charge or complaint set out on the face of the declaration. If it does not do this, reasonably and substantially, it is a nullity (s). It must also, where the libel is in writing, justify everything contained in the libel which is injurious to the plaintiff. If it imputes to the latter that he has been guilty of some act that is discreditable to him as a gentleman, as well as of a criminal offence, the plea of justification must cover the whole charge (t). But if the libel contains several charges, the defendant may justify some of them, and plead not guilty as to others (u). A plea of justification, imputing general misconduct to the plaintiff, and giving no specific instances of it, was formerly

(o) The special plea of apology and payment into court cannot be pleaded along with Not guilty to the same part of the declaration. *O'Brien v. Clement*, 15 M. & W. 435.

(p) *Lafone v. Smith*, 7 W. R. 13.

(q) *Barrett v. Long*, 3 H. L. C. 414.

(r) *Smith v. Richardson*, Willes, 20.

(s) *Tighe v. Cooper*, 7 Ell. & Bl. 639; 26 Law, J., Q. B. 215. *Wyatt v. Gore*, Holt, N. P. C. n.

(t) *Heclaham v. Blackwood*, 11 C. B. 128. *Mountney v. Walton*, 2 B. & Ad. 673.

(u) *M'Gregor v. Gregory*, 11 M. & W. 287.

held bad on special demurrer (*x*). A defendant, for example, was not at liberty to charge a plaintiff with swindling, without showing any special instances of it on the record, that the plaintiff might come prepared to meet them (*y*).

Where a defendant justifies words which amount to a charge of felony, and proves his justification, and obtains a verdict, the plaintiff may afterwards be put upon his trial for the felony by that verdict without the intervention of a grand jury (*z*).

The publication and dissemination of written or printed slander cannot be justified, as we have seen, on the ground that the libellous matter was previously published by a third person, and that the defendant, at the time of his publication, disclosed the name of that person, and believed all the statements contained in the libel to be true (*a*).

Evidence for the plaintiff—Proof of the publication of a libel.—If a man writes a libel, and puts it into his desk, this is no publication of it; but if a libellous paper or placard has been notoriously circulated or posted up in places of public resort, proof of a paper in the defendant's handwriting, corresponding with the libellous placard, will be *prima facie* evidence against him of his being the author of the libel, and render it necessary for him to explain the matter (*b*). A libellous paper in the handwriting of the defendant, found in the house of the editor of a newspaper, in which the libel complained of appeared, is admissible in evidence against the defendant, notwithstanding several parts of it have been erased, and are omitted in the newspaper, provided the passages erased do not qualify the libel (*c*). If the libel on which the action is founded contains any marked peculiarities in spelling, style, or composition, letters of the defendant concerning the plaintiff containing similar peculiarities are admissible in evidence, to show that the defendant was the writer of the libel (*d*).

Where a defendant, who had a copy of a libellous caricature in his house, showed it to another on being requested so to do, Lord Ellenborough ruled that this was not sufficient evidence of publication to support an action (*e*).

Libellous matter contained in a private letter addressed to the plaintiff himself, and only delivered into his own hands, is not such a publication

(*x*) *Hickinbotham v. Leech*, 10 M. & W. 301. *O'Brien v. Clement*, 16 ib. 165.

(*y*) *Buller, J., J'anson v. Stuart*, 1 T. R. 753; 1 Smith's L. C. 4th edn. 50-61.

(*z*) *Ld. Kenyon, Cook v. Field*, 3 Esp. 184.

(*a*) *Tidman v. Ainslie*, 10 Exch. 63. *M'Pherson v. Daniels*, 10 B. & C. 273, overruling the 4th resolution in *Ld.*

Northampton's case, 12 Rep. 184; ante, p. 577.

(*b*) *Rex v. Beare*, 1 Ld. Raym. 417. *Lamb's case*, 9 Co. 59 b. *Rex v. Burdett*, 3 B. & Ald. 717; 4 B. & Ald. 95.

(*c*) *Tarpley v. Blabey*, 2 Bing. N. C. 437.

(*d*) *Brookes v. Titchborne*, 5 Exch. 929.

(*e*) *Smith v. Wood*, 3 Campb. 328.

of a libel as will support an action (*f*). But where it was proved that the defendant addressed a libellous letter to the plaintiff, knowing that the plaintiff's clerk, in the absence of the plaintiff, was in the habit of opening the plaintiff's letters, and the letter was, in point of fact, received and opened by the clerk before it reached the plaintiff's hands, Lord Ellenborough held that there was sufficient evidence for the jury to consider whether the defendant did not intend to put the clerk into possession of the letter, and that if he did, there would be a publication of its libellous contents (*g*). The sending of a letter to a wife containing libellous charges against her husband is a sufficient publication of the libel; for, to injure "a man's character with his wife," or to assail his honour by communications made to her, is to do him a grievous wrong (*h*).

If a letter is sent by post, it is *prima facie* evidence that the party to whom it was addressed received it in due course (*i*).

Where the defendant's daughter had been employed by him to make out his bills and write letters for him on matters of business, and the daughter wrote and published a libel upon the plaintiff in her father's (the defendant's) name, it was held that this was not sufficient to fix him with the authorship of the libel; for the principal is only responsible for the acts of his agent within the limits of the authority delegated to the agent, and that it did not follow, from a daughter being employed to make out bills and write letters for her father for the purpose of conducting his business, that she was authorized by him to write a libel; and that there ought to be some evidence to show that the libel was written either by the command, or with the knowledge, of the defendant (*k*). But if a man request another generally to write a libel, he is answerable for the libel written pursuant to his request, and must take his chance of what appears. He is responsible, though something may be added which he did not state (*l*).

Proof of publication of newspapers.—Every sale of a newspaper to a party sent to purchase it is a fresh publication, and, therefore, where an action was brought in respect of a libel in a newspaper, published seventeen years before the action, and the Statute of Limitations was pleaded, it was held that the plea was negatived by proof that a copy of the paper had been purchased from the defendant by the plaintiff's servant, sent to obtain it, within the six years. And where the proof of publication relied on was the sale of a copy of a newspaper to a messenger sent by the

(*f*) *Phillips v. Jansen*, 1 Esp. 625.
Peacock v. Reynal, 2 Brownl. 151.

(*g*) *Delacroix v. Thevenot*, 2 Stark. 63.

(*h*) *Wenman v. Ash*, 13 C. B. 842; 22
Law, J., C. P. 100.

(*i*) *Warren v. Warren*, 1 Cr. M. & R.
250.

(*k*) *Harding v. Greening*, 1 Moore, 479.

(*l*) *Reg. v. Cooper*, 8 Q. B. 636.

plaintiff to procure it, who, on receiving it, carried it to the plaintiff, it was held that this was a sufficient publication to sustain an action for damages; for a defendant who, on the application of a stranger, delivers to him the writing which libels a third person, publishes the libellous matter to such stranger, though he may have been sent for the work by the plaintiff himself (*m*).

If a man wraps up a newspaper, and sends it into another county by a boy, the man who sends the paper is the publisher of it, and not the boy, who is ignorant of the contents of the paper, and is an innocent agent in the transaction (*n*).

Proof of the delivery, by order of the defendant, of a copy of a newspaper to the officer at the Stamp Office, is proof of publication (*o*).

Proof of proprietorship of newspapers containing libels.—Before any newspaper can be lawfully printed and published, a declaration in writing must be delivered (6 & 7 Wm. 4, c. 76), to the Stamp Office, or the proper officer for stamps in the district within which the newspaper is intended to be published, setting forth the correct title of the newspaper, a true description of the building wherein it is intended to be printed and published, the true name, addition, and place of abode of the printer, publisher, and proprietor, or two out of several proprietors. This declaration must be signed (s. 6) by every person named therein as printer or publisher, and must be renewed to meet changes and alterations in the proprietorship, or in the persons printing or publishing the paper. These declarations are to be filed and kept by the Commissioners of Stamps and Taxes, and certified copies of them are to be admitted (s. 8) in civil and criminal proceedings, touching any newspaper mentioned in any such declaration, and touching any publication or matter contained in any such newspaper, as conclusive evidence of the truth of all such matters set forth in such declaration, as are required to be therein set forth, and of their continuance in the same condition against every person who shall have signed such declaration, unless it shall be proved that such person had become lunatic, or that previous to the publication in question he had signed and delivered to the proper officer a declaration that he had ceased to be printer, publisher, or proprietor, or that a new declaration, in which he did not join, had been made and delivered to the proper authorities.

Provision is made for the issue of certified copies of these declarations, and it is enacted (s. 8) that in all proceedings a copy certified to be a true copy, under the hand of the commissioner or officer described in the act, shall be received in evidence against every person named in the decla-

(*m*) *Duke of Brunswick v. Harmer*, 14 126.
Q. B. 189.

(*n*) Best, J., *Rees v. Burdett*, 4 B. & Ald.

(*o*) *Rees v. Amphlett*, 4 B. & C. 35.

ration, as a person making or signing the same, as sufficient proof of such declaration, and of the contents thereof; and that the same was duly signed and made according to the act. And whenever a certified copy has been produced in evidence against a person who has signed and made such declaration, and a newspaper shall afterwards be produced in evidence, intituled in the same manner as the newspaper mentioned in such declaration, and having the name of the printer and publisher and the place of printing the same, or purporting to be the same as in the declaration, though not in the same form, it shall not be necessary for the plaintiff, in any action or other proceeding, to prove that the newspaper was purchased of the defendant, or at any house, shop, or office belonging to, or occupied by him, his servants, or workmen (*p*).

If a mortgagee of shares in a newspaper, to protect his own interests, takes the precaution of registering himself "as legal owner as mortgagee," and the mortgagor registers himself as owner of the equity of redemption, both are liable as proprietors (*q*).

Proof of the utterance of the words charged in actions for verbal slander.—The plaintiff need not prove all the words laid in the declaration, but he must prove so much of the very words alleged to have been spoken as is sufficient to sustain his cause of action; and it is not enough for him to prove equivalent words of slander (*r*); but if the words proved in evidence convey substantially the same imputation, and the only difference is that the same thing is expressed in a different form of words, or is proved to have been done in a different way from that charged in the declaration, the variance may be amended at the trial (*s*). If words alleged to have been spoken affirmatively were only put interrogatively, or if they convey quite a different imputation from that charged in the declaration (*t*), the defect cannot be amended.

A defendant who is sued for verbal slander is responsible, only as we have seen, for what he himself has uttered. He cannot be made liable in damages for an unauthorized repetition of the slander by a party to whom he originally communicated, such a communication not being the necessary consequence of the original uttering of the slandering words (*u*).

Proof of the singing of libellous songs.—Where a libellous song was sung in the streets from a printed paper, which had been destroyed, the singer of the song was allowed to prove that a paper produced was an

(*p*) *Mayne v. Fletcher*, 9 B. & C. 385.
 (*q*) *Brunswick v. Harmer*, 3 C. & K. 12.
 (*r*) *Baker v. Wilkinson*, Car. & M. 401.
 (*s*) *Maitland v. Goldney*, 2 East. 437.
Orpwood v. Barkes, 4 Bing. 268.
 (*t*) Post, ch. 20, s. 1. AMENDMENT.

(*t*) *Barnes v. Holloway*, 8 T. R. 150.
Bell v. Byrne, 13 East. 563. *Walters v. Mace*, 2 B. & Ald. 756. *Cartwright v. Wright*, 5 B. & Ald. 616. *Brooks v. Blanshard*, 1 Cr. & M. 791.
 (*u*) *Ward v. Weeks*, 4 M. & P. 808.

exact copy of the song that was sung (*x*). Where a number of placards are printed by order of the defendant, no one of the printed papers is an original more than the rest. When they are printed they all become originals, and the manuscript is discharged (*y*).

Proof of the application of the libel to the plaintiff when no person in particular is named on the face of it.—If the libellous words point to no person in particular, it becomes a question of evidence whether they do or do not apply to the plaintiff (*z*). If the name of the party libelled is left in blank, or is designated by asterisks, evidence may be given to show who was meant. "It is not necessary that all the world should understand the libel; it is sufficient if those who know the plaintiff can make out that he is the person meant" (*a*). Where a class is described, it may very well be that the slander refers to a particular individual. That is a matter of which evidence is to be laid before a jury, and the jurors are to determine whether, when a class is referred to, the slander was pointed at the plaintiff (*b*).

Where it appears, from the matter complained of, that there was not any intention of libelling any particular individual, but that the imputations intended to be conveyed were meant to be cast upon the public authorities, or some one of several publick functionaries, the plaintiff cannot recover (*c*).

Proof of the defamatory sense attributed to the words used.—It must appear to the court, from the words set out in the declaration, that they are capable of conveying or bearing the defamatory meaning assigned to them; and if so, it is for the jury to determine whether, in point of fact, the construction put upon the words by the plaintiff is borne out by the evidence (*d*). When the words are susceptible of a harmless meaning, it is for the plaintiff to show that they were used in a libellous and not in a harmless sense. If the plaintiff attributes to them a much wider and more extensive meaning than they fairly warrant, or the words do not fairly bear the meaning imputed to them, the defendant will be entitled to a verdict (*e*), unless the words are manifestly libellous as they stand, and require no meaning to be assigned to them; in which case the meaning assigned to them by the plaintiff may be rejected as surplusage (*f*). An insensible or repugnant meaning may be rejected as surplusage on

(*x*) *Johnson v. Hudson*, 7 Ad. & E. 293 n.

(*y*) *Rex v. Watson*, 2 Stark. 130.

(*z*) *Merywether v. Turner*, 19 Law, J., C. P. 10.

(*a*) *Bourke v. Warren*, 2 C. & P. 310.

(*b*) *Le Fanu v. Malcolmson*, 1 H. L. C. 687.

(*c*) *Solomon v. Lawson*, 8 Q. B. 823.

(*d*) *Solomon v. Lawson*. *Hemmings v. Gasson*, ante, pp. 607, 612.

(*e*) *Broome v. Gosden*, 1 C. B. 732. *Williams v. Gardiner*, 1 M. & W. 249.

(*f*) *Harvey v. French*, 1 Cr. & M. 11. *Roberts v. Camden*, 9 East. 92.

demurrer, or on motion in arrest of judgment; but a plaintiff who has by his declaration assigned a particular meaning to equivocal words, which are not necessarily slanderous, and fails to establish that meaning by his evidence, cannot reject the meaning he has himself adopted, and resort to another interpretation of the words (*g*).

Where the words used have an equivocal meaning, but are well understood and known in a libellous sense, it is for a jury to say whether they were used in that sense or not (*h*). "We ought to attribute," observes Coleridge, J., "to a jury an acquaintance with ordinary terms and allusions, whether historical, or figurative, or parabolical. If an expression, originally allegorical, has passed into such common use that it ceases to be figurative, and has obtained a signification almost literal, we must understand it as it is used." The term "frozen snake," has an application very generally known, which is calculated to bring into contempt a person against whom it is directed. If, therefore, a publication imputes to a person that his friends, who have been assisting him, have realized in him the fable of the frozen snake, it is for a jury to say whether these words do not convey an imputation of ingratitude to friends and benefactors, and if they do they are actionable (*i*).

If the meaning is so obscure and doubtful as to render the document incomprehensible, it is not actionable, although the plaintiff's name may be mentioned therein in an impertinent manner, and the publication may have been evidently intended to vex and annoy him (*k*).

In an action for words, some of which, if spoken and understood in their ordinary sense, would certainly be actionable, the jury may consider whether, taking the whole of the conversation together, the particular words are so qualified by the other parts of the conversation as to show that they were not intended to give the idea which their ordinary and primary meaning would give (*l*). If the words themselves are not of a defamatory character, they are not actionable, although special damage may have resulted to the plaintiff from the utterance of them. There is no ground for presuming malice from the utterance of words innocent in themselves, and a jury cannot infer it. Thus where the plaintiff, a serving-maid and shopwoman, alleged in her declaration that the defendant maliciously spoke these words concerning her,—“She (the plaintiff) secreted 1s. 6d. under the till, stating that these are not times to be robbed;” and that by reason of the speaking of these words by the defendant she had been refused a situation,

(*g*) *Williams v. Stott*, 1 Cr. & M. 680.
Smith v. Carey, 3 Campb. 461. *Sellers*
v. Till, 4 B. & C. 655.

(*h*) *Wakley v. Healey*, 7 C. B. 805.
Baboneau v. Farrell, 15 C. B. 380. *Gre-*

ville v. Chapman, 5 Q. B. 745.

(*i*) *Hoare v. Silverlock*, 12 Q. B. 624.

(*k*) *Capel v. Jones*, 4 C. B. 203.

(*l*) *Shipley v. Todhunter*, 7 C. & P.
 680.

it was held that, as the words did not of necessity import anything injurious to the plaintiff's character, they were not capable of sustaining an action, although they had been followed by special damage. "It is said," observes Patteson, J., "that the words are actionable because a person, after hearing them, chose in his caprice to reject the plaintiff as a servant. But if the matter was not in its nature defamatory, the rejection of the plaintiff cannot be considered the natural result of the speaking of the words. To make the speaking of the words wrongful, they must in their nature be defamatory" (m).

Of the admissibility of evidence of surrounding circumstances to explain and point the libel—Interpretation of the words used.—The ordinary popular sense of the writing, language, or words alleged to be libellous or defamatory, is to be taken to be the meaning of the printer, publisher, or speaker of them (ante, p. 607); but a foundation may be laid for showing another and different meaning. Something may have previously passed which gives a peculiar character and meaning to some expression; and some word, which ordinarily or popularly is used in one sense, may, from something that has gone before, have a meaning different from its usual meaning. When, therefore, it is wished to get rid of the ordinary meaning, the witness must be asked if there was anything to prevent those words from conveying the meaning they ordinarily would convey; and if evidence is given, and a foundation laid for it, then the further question may be put, "What did you understand by them?" (n) It must first be shown that the word is used in, and has acquired a peculiar sense, and then a witness may be asked whether he understood it in that sense. The phrase "lame duck," would be actionable if applied to a person on the Stock Exchange, because there it has acquired a particular meaning, which could be shown. So of the word "black sheep" as applied to an attorney; so of the word "blackleg," if it can be shown that it had acquired a similar signification as applied to gamblers (o).

Words spoken at different times may be given in evidence for the purpose of making out the charge laid in the declaration, or to prove the animus of the defendant; but if they in themselves constitute so many different libels, giving rise to separate and distinct causes of action, the jury must be cautioned not to give damages in respect of them.

Proof of subsequent libels to explain and point the libel charged in the declaration may be given, but if the evidence is offered for the mere purpose of swelling the damages it will be rejected. "The distinction," observes Lord Abinger, "is, you may give evidence of subsequent words

(m) *Kelly v. Partington*, 5 B. & Ad. 651.

(n) *Daines v. Hartley*, 3 Exch. 205.

(o) *Watson, B., Barnett v. Allen*, 3 H. & N. 381; 27 Law, J., Exch. 415.

to explain the words in the declaration: but when there is nothing equivocal in the words charged, you cannot give evidence of subsequent words of the same import, for which subsequent words another action may be brought and damages recovered; inasmuch as the record in this action would be no bar to a subsequent action for the same words, though the evidence now offered would tend to aggravate the damages in this" (p).

Proof of successive libels to show malice.—As the spirit and intention of the party publishing a libel are fit to be considered by a jury in estimating the injury done to the plaintiff, evidence tending to prove it cannot be excluded simply because it may disclose another and different cause of action; but whenever the evidence given does disclose another cause of action, the jury should be cautioned against giving any damages in respect of it. And if such evidence is offered merely for the purpose of obtaining damages for such subsequent injury, it will be properly rejected (q). Defamatory statements, therefore, made by the defendant subsequently to the publication of the libel, are admissible in evidence merely to show malice; but if any considerable distance of time has elapsed between the publication of the libel and the speaking of the words, they ought to be received with very great caution, as they may refer to something that has taken place between the plaintiff and the defendant subsequently to the libel, and may not, therefore, amount to any proof of malice at the time of the publication of the libel (r). And when such statements are given in evidence, the defendant is entitled to get rid of the effect of them by proving the truth of the words (s).

Evidence of malice.—To sustain an action for a libel or for slander, the plaintiff must show that it was malicious; but every unauthorized publication of defamatory matter is, as we have seen, in point of law to be considered malicious, and it is a question of law whether the communication is authorized or not. If it be authorized, the legal presumption of malice arising from the unauthorized publication of defamatory matter fails, and the plaintiff, to sustain his action, must prove actual malice, or, as it is usually expressed, malice in fact (t). Whenever one man is proved to have used words imputing the commission of felony, or of any other indictable offence to another, he will be taken to have used them maliciously, unless he gives some sufficient excuse for using them, as in giving the character of a servant, making a charge to a constable, &c. The

(p) *Pearce v. Ormsby*, 1 Mood. & Rob. 456.

(q) *Pearson v. Le Maître*, 5 M. & Gr. 720; 6 Sc. N. R. 607. *Barwell v. Adkins*, 1 ib. 808. *Darby v. Ouseley*, 1 H. & N. 13.

(r) *Hemmings v. Gasson*, 1 Ell. Bl. & Ell. 346; 27 Law, J. Q. B. 252.

(s) *Warne v. Chadwell*, 2 Stark. 457.

(t) *Cresswell, J., Cozhead v. Richards*, 2 C. B. 605.

defendant's conduct in putting a justification on the record which he does not attempt to prove, and will not abandon, may be taken into consideration by a jury, as proving malice and aggravating the injury, and every other part of the defendant's conduct down to the time of the trial may be considered by the jury; for acts, although subsequent, may indicate the existence of motives at a former time (u).

Proof of injury to the plaintiff.—To enable the plaintiff to maintain an action, and recover damages for the writing or publication of a libel, it must be shown, as we have seen, that the plaintiff is the person to whom the injury from the libel immediately accrues. If the injury is too remote, and not to be connected with the publication of the libel, the plaintiff will be nonsuited (ante, pp. 609, 610). If the tendency of the publication is injurious to the plaintiff, the law will presume that the defendant, by the act of publishing it, intended to produce the injury—it was calculated to effect, and it is the duty of a judge, if he thinks the publication injurious to the plaintiff, to tell the jury it is a libel and actionable (x). Every person who publishes in writing matter injurious to the character of another, is considered in point of law to have intended the consequences resulting from that act (y).

Proof of special damage.—When proof of special damage is essential to the maintenance of the action (ante, p. 597), it must be proved as laid, and any substantial variance between the allegation and the proof will be ground of nonsuit. It must appear also to be the natural and necessary result of the speaking of the words, or it will fail to sustain the action. If there are two distinct causes of special damage, one proceeding from the act of the defendant and another from the act of a third party, and the special damage may have resulted from either, it will fail to support an action (z). If the declaration alleges as special damage that several named persons had ceased to have dealings with the plaintiff in the way of his trade, the persons themselves must be called to prove the fact (a).

Proof of the trade, or profession, or official character of the plaintiff.—Where the libel imputes to the plaintiff misconduct in his practice of a physician, or surgeon, or an attorney, not doubting or denying his qualification to practise, it will not be necessary to do more than prove that the plaintiff was acting in the particular professional capacity imputed to him at the time of the publication of the libel (b). But when the libel or slander imputes to a medical or legal practitioner that he is not properly

(u) *Simpson v. Robinson*, 12 Q. B. 513.

(x) *Haire v. Wilson*, 9 B. & C. 645.

(y) *Fisher v. Clement*, 10 B. & C. 475.

(z) *Vicars v. Wilcocks*, 8 East. 2.

(a) *Tilk v. Parsons*, 2 C. & P. 202.

Tunncliffe v. Moss, 3 C. & K. 88.

(b) *Berryman v. Wise*, 4 T. R. 366.

Smith v. Taylor, 1 N. R. (B. & P.) 204.

Rutherford v. Evans, 6 Bing. 451.

qualified, and the professional qualification is denied, the plaintiff must be prepared to prove it, by producing his diploma or certificate, duly sealed or signed, and stamped, where a stamp is requisite. If the document is not admissible in evidence on its production under the Documentary Evidence Act (c), the signatures must be proved in the ordinary way.

Proof that the words were spoken concerning a tradesman or professional man in the way of his trade or profession.—In order to recover damages for slanderous words spoken of a tradesman or professional man in his trade or profession, it must be shown how the words were connected with his profession. To impute immorality to a clerk of a gas company, to say that he “consorts with whores,” is “a disgrace to the town,” and “unfit to hold his situation,” is not actionable, because they are not connected with his character and conduct as a clerk. He may be a very good clerk, well fitted for his duties, although he is scandalously immoral (d).

Evidence on the part of the defendant—Traverse of material allegations.—If the libel contains a charge upon a man in the way of his trade or business, the allegation concerning such trade or business must, if traversed, be strictly proved as it is set forth in the declaration, and the defendant is at liberty to bring evidence to disprove it; notwithstanding, the disproving of the allegation does in effect prove the truth of the libel. If the plaintiff in his declaration alleges that he was, at the time of the publication of the libel, the manufacturer of a particular article, which he supplied to his customers in the way of his trade, and the defendant traverses the allegation, and the plaintiff establishes a *prima facie* case, the defendant is entitled to prove that the plaintiff did not manufacture the particular article he pretended to make, but a composition of a very different description, although the evidence amounts to proof of the truth of the charge imputed by the libel, and there is no plea of justification on the record (e).

Evidence by the defendant of the truth of the charge or accusation.—If the defendant can show that the defamatory charge or accusation made by him against the plaintiff is true in substance, he answers the claim for damages. But to enable him to give the truth in evidence, in answer to the action, there must be a plea of justification on the record (f). The truth is an answer to the action, not because it negatives the charge of malice (for a person may wrongfully or maliciously utter slanderous matter though true, and thereby subject himself to an indictment), but because it shows that the plaintiff is not entitled to recover damages, for

(c) 8 & 9 Vict. c. 113; post, ch. 20.
14 & 15 Vict. c. 99, s. 8.

(d) *Lumby v. Allday*, 1 Cr. & Jerv. 301.

(e) *Manning v. Clement*, 7 Bing. 368.

(f) *O'Brien v. Bryant*, 16 M. & W. 168. *Edsall v. Russell*, 5 Sc. N. R. 801.

the law will not permit a man to recover damages in respect of an injury to character which he either does not, or ought not, to possess (*g*).

Where the defendant justifies words which impute a felony to the plaintiff, it is competent to him to go into proof of his justification, although the plaintiff has been tried and acquitted of the charge, the trial and acquittal being *res inter alios acta* (*h*). If the plaintiff has been tried and convicted, the conviction may be given in evidence in support of the plea of justification. If a man be adjudged by the sessions to be the father of a bastard child, the adjudication is an answer to any complaint made by him, in the spiritual court or elsewhere, against any one for saying or publishing that he has had a bastard (*i*). When the plaintiff has not been actually convicted of the felony he must be tried by the jury on the plea of justification, in the same way as if he was on his trial upon an indictment for the offence in a criminal court; so that, if there is a doubt of his guilt, the jury are bound to give him the benefit of the doubt (*k*).

If a party publishes a libel and then pleads a justification, the court will not assist him to obtain evidence in support of his plea (*l*).

Proof of privileged communications.—Proof of the libel or slander having been published or uttered in the course of legal proceedings, is *prima facie* evidence that it was published or uttered under the sanction and protection of a court of competent authority (*ante*, p. 582). If it is shown to have been published in a petition or complaint to parliament, or to the Queen, or her ministers, containing a temperate statement of a grievance calling for inquiry and redress, this will be *prima facie* evidence that it was published for sufficient cause and upon proper motives. If it is shown to have been a private communication between friends, it must be proved to have related to matters of family or pecuniary interest, directly affecting the writer of the communication (*ante*, p. 587).

The damages recoverable in actions for defamation will materially depend upon the nature and character of the libel, the extent of its circulation, the position in life of the parties, and the surrounding circumstances of the case. Where an action was brought for slanderous words, imputing subornation of perjury to the plaintiff, and the defendant suffered judgment by default, and on the execution of a writ of inquiry of damages the plaintiff gave no evidence of any actual damage; but his counsel addressed the jury, who assessed the damages at 40*l.*, and the defendant then moved to set aside the inquisition on the ground that nominal damages only were reco-

(*g*) *Littledale, J.*, 10 B. & C. 272.

(*h*) *England v. Bourke*, 3 Esp. 80.
Cook v. Field, *ib.* 134.

(*i*) *Thornton v. Pickering*, 1 Freem.
283. *Webb v. Cook*, Cro. Jac. 535. *Res*

v. Ristip, 1 Ld. Raym. 394. *Jervis, C. J.*,
Helsham v. Blackwood, 11 C. B. 128.

(*k*) *Richards v. Turner*, Car. & M. 417.

(*l*) *Metrop. Saloon Om. Co. v. Hawkins*,
4 H. & N. 151.

verable in the absence of any proof of damage on the part of the plaintiff, it was held that the plaintiff was not bound to give any such evidence (*m*). If the defendant had any ground to urge in mitigation of damages, he should have proved it before the sheriff's jury.

The jury may give to the plaintiff damages for the publication of the libel and for the mental suffering arising from the apprehension of the consequences of the publication (*n*). The damages are almost altogether in the discretion of the jury. The court will not interfere with them unless they are shown to be manifestly outrageous and extravagant (*o*).

Evidence in aggravation of damages cannot, as we have seen, be given, if it establishes another cause of action against the plaintiff; for, if that were permitted, the jury would be giving damages for a second libel in an action for the first (*p*). Although a plea of justification, imputing felony to the plaintiff, is abandoned at the trial and apologized for, still, the putting of such a plea upon the record and failing to prove it is evidence of malice, and a great aggravation of the defendant's conduct, as showing an animus of persevering in the charge to the very last. The putting of such a plea upon the record, therefore, is a matter proper to be taken into account by the jury in estimating the amount of damages (*q*).

Evidence in mitigation of damages.—A defendant is not now allowed to give evidence of the truth of the defamatory charge or statement in mitigation of damages (*r*), but must, if he wishes to rely upon it in any way, put a plea of justification on the record. But where the plaintiff, by his declaration, alleges that before the publication of the libel he had always preserved a good character in society, from which he has been driven by the insinuations in the libel, and claims damages accordingly, evidence is admissible to show that, prior to the publication of the libel, the plaintiff's character was so bad that he was universally avoided and shunned (*s*); for, whenever a person claims damages on the ground of disparagement to his character, it may be shown by evidence that his character was blemished prior to the utterance of the slander of which he now complains (*t*).

Evidence of this sort must, however, be used with extreme caution, or it will tend to the aggravation rather than the mitigation of the damages. If the circumstances amount to a justification of the libel, they are not then receivable in mitigation of damages, as they should have been pleaded by

(*m*) *Tripp v. Thomas*, 3 B. & C. 427.

(*n*) *Goslin v. Corry*, 8 Sc. N. R. 25.

(*o*) *Gilbert v. Burtenshaw*, Cowp. 280.
Higmore v. Earl of Harrington, 3 C. B.
N. S. 142. *Harrison v. Pearce*, 32 Law,
T. R. 298.

(*p*) *Ante*, p. 623. *Finnerty v. Tipper*,
2 Campb. 74.

(*q*) *Warwick v. Foulkes*, 12 M. & W.
508.

(*r*) *Underwood v. Parks*, 2 Str. 1200.

(*s*) *Earl of Leicester v. Waller*, 2 Campb.
251.

(*t*) *Ld. Ellenborough, C. J., — v. Moor*, 1 M. & S. 286.

way of justification if the defendant meant to rely upon them (u). In some cases, general evidence of the plaintiff's bad character has been held to be inadmissible by way of mitigation of damages (x). In other cases, the defendant has been allowed to prove, by cross-examination of the plaintiff's witnesses, that rumours and reports of the same tenor as the libel were current prior to the publication of the libel, and were the common topics of conversation (y). Rumours current *after* the utterance of slander cannot, of course, help the defence, as they are the natural result of the dissemination of the slander, and tend only to aggravate the damages (z).

It is no ground for mitigation of damages that the defendant, at the time he uttered the slander, stated that he heard it from another person, naming such person (a).

Mitigation of damages by proving libels by the plaintiff on the defendant.—“If a man is in the habit of libelling others, he complains,” observes Sir James Mansfield, “with a very bad grace of being libelled himself; and if two men are concerned in publishing monstrous libels against each other every day, there can be no claim to damages on either side” (b). But the defendant cannot give in evidence, in mitigation of damages, other libels published concerning him, unless the defendant can show that the libels proceeding from the plaintiff were connected with the libels proceeding from the defendant, for one libel cannot be set off against another, unless it can be shown that they are connected together, and that the libel published by the plaintiff provoked the libel published by the defendant, and that the plaintiff is himself, to a certain extent, the cause of the injury for which he claims compensation in damages (c). When the object is to show that the defendant was provoked, by libels published against him by the plaintiff, to retaliate by publishing the libel of which the plaintiff complains, it is essential to prove that the plaintiff's libels came to the defendant's knowledge before he published his libel (d).

Evidence of offers of apology in mitigation of damages.—By 6 & 7 Vict. c. 96, s. 1, it is enacted, that in any action for defamation it shall be lawful for the defendant (after notice in writing of his intention, given to the plaintiff at the time of filing or delivering the plea in such action), to give in evidence in mitigation of damages that he made or offered an apology to the plaintiff for such defamation before the commencement of

(u) *Watson v. Christie*, 2 B. & P. 224; 10 B. & P. 21, s. 1.

(x) *Jones v. Stevens*, 11 Pr. 265.

(y) *Wyatt v. Gore*, Holt, N. P. C. 306.
Richards v. Richards, 2 Mood. & Rob. 557.

(z) *Thompson v. Nye*, 20 Law, J., Q. B.

85; 16 Q. B. 175.

(a) *Bennett v. Bennett*, 6 C. & P. 588; ante, p. 616.

(b) *Finnerly v. Tipper*, 2 Campb. 72.

(c) *May v. Brown*, 3 B. & C. 126.
Tarpley v. Blabey, 2 Bing. N. C. 411.

(d) *Watts v. Fraser*, 7 Ad. & E. 232.

the action, or as soon afterwards as he had an opportunity, in case the action was commenced before there was an opportunity of offering an apology (ante, p. 614).

Of the judge's direction to the jury.—The stat. 32 Geo. 3, c. 60, s. 1, enacts, that on trials for libel the jury may give a general verdict of guilty or not guilty, upon the whole matter put in issue, and shall not be required or directed by the court or judge to find the defendant guilty merely on the proof of the publication by the defendant of the paper charged to be a libel, and of the sense ascribed to the same. Also (s. 2) that the judge shall, according to his discretion, give his opinion and directions to the jury on the matter in issue (e). The usual course in cases of libel since the passing of this statute is, first to give a legal definition of the offence, and then to leave it to the jury to say whether the facts necessary to constitute that offence are proved to their satisfaction, and that whether the libel is the subject of a criminal prosecution or a civil action. The judge, as a matter of advice to them in deciding the question, may give his own opinion as to the nature of the publication, but is not bound to do so as a matter of law (f). "The cases," observes Lord Denman, "show that a judge must not leave the fact of the defendant's intention as a question for the jury (g), except so far as the intention may be shown by the tendency of the publication itself. A man may wilfully publish a mischievous libel without intending to injure the party, and may be responsible. He may, indeed, in effect do him no harm by the publication; for it may be that blame from some quarters is more valuable than praise. Yet he must answer for such a publication" (h).

It is the duty of the judge to say whether a publication is capable of the meaning ascribed to it; but when the judge is satisfied of that, it must be left to the jury to say whether the publication has the meaning (i).

Where the defendant sets up as a defence that the communication was a privileged communication, but the judge holds that there are comments by the defendant in excess of the privilege, the judge is not thereby justified in telling the jury that the defendant, by exceeding his privilege, has been guilty of a libel, for whenever there is evidence of malice, either extrinsic or intrinsic, in answer to the immunity claimed, by reason of the occasion, a question arises, which the jury, and the jury alone, ought to determine. Whenever there are expressions in a publication which may reasonably be contended to prove malice, the plaintiff has a right to have the whole matter submitted to the jury, for them to say whether, in

(e) *Baylis v. Lawrence*, 11 Ad. & E. 924.

(f) *Parmiter v. Coupland*, 6 M. & W. 108. *Rex v. Watson*, 2 T. R. 206.

(g) *Haire v. Wilson*, 9 B. & C. 645.

(h) *Baylis v. Lawrence*, 11 Ad. & E. 924.

(i) *Sturt v. Blagg*, 10 Q. B. 908.

writing and publishing it, the defendant was acting *bond fide* or maliciously (*k*).

Arrest of judgment after verdict.—If the judge and jury think the publication libellous, still if on the record it appears not to be so, judgment must be arrested (*l*). If an action be brought for speaking slanderous words all at one time, that is, all in one count, and there is a verdict for the plaintiff, though some of the words will not maintain the action, yet if any of the words will, the damages may be given generally; for it shall be intended that the damages were given for the words which are actionable, and that the others were inserted only for aggravation. But if the action be brought for several slanders spoken at several times, and the action will not lie for the words spoken at one time, but will lie for the words spoken at another, and a verdict be found for all the words, and entire damages given, the judgment will, it seems, be arrested (*m*). If the words appear, upon the face of the declaration, to have been spoken at one time, the whole may be considered as one count, containing words actionable and not actionable, and the verdict will stand upon those which are actionable (*n*).

(*k*) *Cooke v. Wildes*, 5 Ell. & Bl. 342;
25 Law, J., Q. B. 367.

(*l*) *Hearne v. Stowell*, 12 Ad. & E. 731.
Goldstein v. Foss, 6 B. & C. 159. *Solomon*

v. Lawson, 8 Q. B. 837.

(*m*) *Griffiths v. Lewis*, 8 Q. B. 852.

(*n*) *Alfred v. Farlow*, ib. 863.

CHAPTER XVII.

OF FRAUDULENT MISREPRESENTATION AND DECEIT, FRAUDULENT CONCEALMENT, BREACH OF WARRANTY AND FALSE PRETENCES.

SECTION I.—*Of fraudulent misrepresentation and deceit, fraudulent concealment, breach of warranty, and false pretences.*

—Wilful and unintentional deceit—
—Representations by a party of a particular fact when he knows that he has no knowledge at all about it—Statements and representations which must be authenticated by a signed writing—False representations concerning the conduct, credit, ability, trade, or dealings of co-partnerships and joint-stock companies—Misrepresentation by directors—Publication of deceitful prospectuses and reports—Representations amounting to a warranty—Representations concerning matters which lie as much within the knowledge of one party as the other—Representations of knowledge where the means of knowledge lie peculiarly with the party making the representation—Representations concerning things plain and obvious—Representations

amounting merely to expressions of opinion and belief—Warranties by vendors—False representations by vendors and manufacturers of the character and quality of the articles they manufacture and sell—Sale of goods by sample—False representations by railway companies—False representations by agents—False assumption of authority—Counterfeiting trade marks—False and fraudulent representations by married women and infants—Fraudulent concealment on sales of chattels—Fraudulent concealment of the dangerous nature of articles delivered to a bailee to be warehoused or carried—Fraudulent sales with all faults and without allowance for any defect, error, or misstatement.

SECTION II.—*Of actions for fraud and deceit.*—Parties, pleadings, defences, and evidence—Proof of fraudulent warranties on sales of horses—Proof of unsoundness—Damages recoverable.

SECTION I.

OF INJURIES FROM FRAUDULENT MISREPRESENTATION AND DECEIT; FRAUDULENT CONCEALMENT, BREACH OF WARRANTY AND FALSE PRETENCES.

Of wilful deceit.—An action cannot be supported for the telling a bare, naked lie, *i. e.* saying a thing which is false, knowing or not knowing it to be so, and without any design to impose upon or cheat another, and with-

out any intention that another should rely upon the false statement and act upon it; but if a falsehood be knowingly told, with an intention that another person should believe it to be true, and act upon it, and that person has acted upon it, and thereby suffered damage, the party telling the falsehood is responsible in damages in an action for deceit, there being a conjunction of wrong and loss, entitling the injured party to compensation (*o*). Where a gun had been delivered by the defendant to the plaintiff for the purpose of being used by him, with an accompanying representation that he might safely use it, and that representation was false to the defendant's knowledge, and the plaintiff, acting upon the faith of its being true, used the gun, and received damage thereby, it was held that he was entitled to recover compensation for the injury from the defendant (*p*).

If a defendant has made a false representation, knowing it to be false, with intent to induce, and has thereby induced the plaintiff to enter into a contract into which, but for that misrepresentation, he would not have entered, and the plaintiff has been damnified by the falsehood, a case of fraud is made out, and an action for damages is maintainable (*q*). It is not necessary in all cases to show that the defendant knew the representation to be untrue; for if he made the statement for a fraudulent purpose, and without believing it to be true, and with the intention of inducing the plaintiff to do an act, and that act is done to the prejudice of the plaintiff, an action for damages is maintainable (*r*).

Unintentional deception.—But a person who has reason to believe, and actually believes, a particular fact to be true, and accordingly represents what he believes, is not liable to an action merely because it turns out that he was mistaken, and that his representation was unintentionally false (*s*); for if every untrue statement which produces damage to another would found an action at law, a man might sue his neighbour for any mode of communicating erroneous information, such (for example) as having a conspicuous clock too slow, whereby the plaintiff was induced to neglect some important duty: but if it be shown that the defendant was under any legal obligation to state the truth correctly to the plaintiff, there would be a legal grievance in misleading him, for which an action would lie; still more so, if he made the false representation with a view to some unfair advantage to himself (*t*).

(*o*) Com. Dig. Action upon the case DECEIT, A. 9, A 10. Parke, B., *Watson v. Poulson*, 16 Jur. 1112. "Dolus malus est omnis machinatio, calliditas, fallacia, ad circumveniendum, fallendum, decipiendum aliquem adhibita."—Dig. lib. 4, tit. 3, lex 1, § 2.

(*p*) *Langridge v. Levy*, 2 M. & W. 580; 4 M. & W. 337.

(*q*) *Canham v. Barry*, 15 C. B. 620.

(*r*) *Taylor v. Ashton*, 11 M. & W. 415.

(*s*) *Collins v. Evans*, 5 Q. B. 826. *Ormrod v. Hust*, 14 M. & W. 684.

(*t*) *Barley v. Walford*, 9 Q. B. 208.

In order to maintain an action for deceit, or for a false and fraudulent representation, it is not necessary to prove that the false representation was made from a corrupt motive of gain to the defendant, or a wicked motive of injury to the plaintiff; it is enough if a representation is made which the party making it knows to be untrue, and which is intended or calculated to induce another to act on the faith of it in such a way as that he may incur damage, and that damage is actually incurred. A wilful falsehood of such a nature is, in the legal sense of the word, a fraud (*u*). Whether the defendant has any interest in the assertion he makes, or in the matter respecting which it is made, is perfectly immaterial (*x*). And whether the representation be made to the plaintiff, or a third party, is immaterial if it is false to the knowledge of the defendant, and has been made for the purpose of being communicated to the plaintiff, in order that he might act upon it, and the plaintiff has acted upon it, and has sustained damage from the deceit (*y*). The general rule appears to be, that if any man makes a fraudulent representation for another to act upon it, either directly or indirectly, and it is calculated to induce that other person to act on it, and he does act on it, the person who makes the representation is responsible in damages. Thus, where a director of a company puts forth transferable shares into the market, and publishes and circulates false statements and representations for the purpose of selling the shares, the false representation is deemed in law to be made to all persons who read the publick announcements, and become purchasers of shares on the faith of the statements contained in them (*z*). But it must be shown that the damage of which the plaintiff complains was brought about by the wrongful act of the defendant (*a*).

False representations under pretence of a claim of right—False claim of lien.—An action is maintainable for a false and malicious representation, though made under the pretence of a claim of right, if it was made without reasonable and probable cause, and must have been known to be false by the party making it, and special damage has resulted to the plaintiff from the wrongful act. Thus, where a defendant knowing that there had been no agreement between him and the plaintiff for a lien on the plaintiff's goods, falsely pretended that he was entitled to a lien on them, and made the representation without any reasonable foundation for it, and from improper and malicious motives, and damage resulted there-

(*u*) *Ld. Tenterden, C. J., Polkill v. Walter*, 3 B. & Ad. 123. *Milne v. Marwood*, 15 C. B. 778; 24 Law, J., C. P. 36.

(*x*) *Pasley v. Freeman*, 3 T. R. 80, 82.

(*y*) *Langridge v. Levy*, ante, p. 632.

(*z*) *Scott v. Dixon*, 20 Law, J., Exch. 62 n. *Bedford v. Bagshaw*, ib. 65. *Ld. Campbell, Wilde v. Gibson*, 1 H. L. C. 663.

(*a*) *Collins v. Cave*, 4 H. & N. 234; 28 Law, J., Exch. 204.

from to the plaintiff, it was held that the defendant was bound to make compensation to the plaintiff for the wrong done to him (b).

Representations by a party of his knowledge of a particular fact, when he knows that he has no knowledge at all upon the subject.—If a man undertakes positively to assert that to be true which he does not know to be true, and which he has no grounds for believing to be true, in order to induce another to act upon the faith of the representation, and the representation is acted upon and turns out to be false, and the party who has acted upon it has been deceived and damaged, he is entitled to maintain an action for compensation. Whoever pretends to positive knowledge of the existence of a particular fact, when in truth he knows nothing at all about it, does in reality make a wilful representation which he knows to be false, and if the representation is made in order that another may rely upon it and act upon it, and it is acted upon, and damage flows from the false representation, the party making it is in principle guilty of wilful deception and fraud (c). Lord Mansfield lays it down generally, that in a representation made to induce a party to make a contract, it is equally false for a man to undertake to assert that of which he knows nothing, as to affirm that to be true which he knows to be false (d). And, says Lord Kenyon, "If a man affirms that to be true within his own knowledge, which he does not know to be true, this falls within the notion of legal fraud. The fraud consists in asserting positively his knowledge of that which he did not know" (e). So, according to Maule, J., "If a man, having no knowledge whatever upon the subject, takes upon himself to represent a certain state of facts to exist, he does so at his peril; and if it be done either with a view to secure some benefit to himself, or to deceive a third person, he is in law guilty of a fraud: for he takes upon himself to warrant his own belief of the truth of that which he asserts. Although the person making the representation may have no knowledge of its falsehood, the representation may, nevertheless, have been fraudulently made" (f).

Statements and representations which must be authenticated by a signed writing—*False representations concerning the conduct, credit, ability, trade, or dealings of third persons.*—By 9 Geo. 4, c. 14, s. 6, it is enacted, that no action shall be brought to charge any person upon, or by reason of any representation or assurance made or given concerning or relating to the conduct, credit, ability, trade, or dealings of any other person, to the

(b) *Green v. Button*, 2 C. M. & R. 716.

(c) *Smout v. Ilbery*, 10 M. & W. 10. *Cresswell, J., and Wilde, C. J., Jarrett v. Kennedy*, 6 C. B. 822. *Erle, J., Jenkins v. Hutchinson*, 18 Q. B. 748. *Randall v.*

Trimen, 18 C. B. 786.

(d) *Paueson v. Watson*, Cowp. 786. *Pulford v. Richards*, 17 Beav. 94.

(e) *Haycraft v. Oakes*, 2 East. 103.

(f) *Evans v. Edmonds*, 13 C. B. 786. *Milne v. Marwood*, 24 Law, J. C. P. 37.

intent or purpose that such other person may obtain credit, money, or goods upon, unless such representation or assurance be made in writing, signed by the party to be charged therewith. A representation to be within the act, must be of the third person's trustworthiness, as evidenced by his character, conduct, ability, credit, trade, or dealings, with intent that he may obtain personal credit on the faith of such representation (*g*). The word "person" is of extensive signification, and is applicable to a corporation sole or aggregate, as well as to a private individual (*h*). Any representation that a party may be trusted, constitutes a representation as to his credit and ability (*i*). If the representation is in writing, and signed by the defendant pursuant to the statute, and the defendant at the time he makes the representation knows that it is untrue, he will be responsible in damages in an action for deceit, if the plaintiff has been induced to give credit on the faith of it (*k*), although he has not relied altogether on the writing, but has trusted partly to the writing and partly to subsequent oral representations (*l*).

Where the defendant's son being about to open a shop, applied to the plaintiffs for a supply of goods upon credit, stating that he had a capital of 300*l*. to begin with, and referred them to his father, the defendant, for a corroboration of his statement, and the plaintiffs wrote to the father inquiring whether the son had, as he asserted, 300*l*. capital his own property, and the defendant wrote in reply that he had, whereas the defendant knew that his son had nothing but borrowed capital, it was held that this was a fraudulent misrepresentation, for which the defendant was liable in damages to the plaintiffs in an action for deceit (*m*). But if the party makes the representation in good faith, honestly believing it to be true, and has reasonable ground for his belief, he is not then responsible if he is altogether mistaken, and formed a wrong judgment in the matter, whatever damage may have resulted to the plaintiff therefrom (*n*).

Representations concerning the character, credit, trade, or dealings of co-partnerships and joint-stock companies—Authentication thereof by a signed writing.—A representation by one of several partners as to the trustworthiness of the firm, is a representation as to the credit of another person within the statute 9 Geo. 4, c. 14, s. 6. It is not the less a representation of the solvency of the other partners that he includes himself (*o*).

(*g*) As to representations of the ability of parties, see *Lyde v. Barnard*, 1 M. & W. 101.

(*h*) *Boyd v. Croydon Rail. Co.*, 4 Bing. N. C. 669.

(*i*) *Swann v. Phillips*, 8 Ad. & E. 461.

(*k*) *Pasley v. Freeman*, 3 T. R. 51.

Foster v. Charles, 6 Bing. 400; 7 Bing. 107.

(*l*) *Tatton v. Wade*, 18 C. B. 371. *Wade v. Tatton*, 25 Law. J., C. P. 242.

(*m*) *Corbett v. Brown*, 8 Bing. 33.

(*n*) *Haycraft v. Creasy*, 2 East. 105.

(*o*) *Devaux v. Steinkeller*, 6 Bing. N. C. 89.

Under the word "person," in the statute, appears to be included a joint-stock company and railway company (*p*), so that representations by one member of the company of the circumstances, credit, and condition of the company, in order to induce another to lend his money, or subscribe, or take shares in the undertaking, must be authenticated by a signed writing, in order to be made the foundation of an action for deceit (*q*).

Misrepresentation by directors of public companies—Publication of deceitful prospectuses and reports.—Where a defendant, knowing that a joint-stock company, of which he was a promoter and director, was a bubble company, and that no *bond fide* dividend could be paid upon the shares, fraudulently pretended by a signed writing to guarantee the bearers of shares a minimum annual dividend of 33*l.* per cent., to induce persons to purchase shares, and the plaintiff, by reason of this representation, purchased shares, and lost his money, it was held that the defendant was responsible in damages to the plaintiff in an action for deceit (*r*). And where the defendant, a director of a joint-stock bank, sanctioned the publication of a report, with his signature attached thereto, professing to set forth the state and condition of the bank, and representing that a particular dividend had been fairly earned, and was properly payable out of profit, and the report was publicly sold, and the plaintiff purchased a copy of it, and read it, and bought shares in the bank, relying on its correctness, and the bank was proved to be insolvent, to the knowledge of the defendant at the time he sanctioned the publication of the report, and the plaintiff lost his money, and incurred serious liabilities, it was held that he was entitled to maintain an action against the defendant for damages (*s*).

If, therefore, directors of public companies authorize the publication and circulation of prospectuses and advertisements concerning the transactions and monetary affairs of the company, containing statements, with their signatures annexed thereto, which are false, to the knowledge of the directors, or which the directors, from their position and means of knowledge, may fairly be taken to warrant as true (*t*), they will be responsible in damages to parties who have taken shares, and invested money in the company, on the faith of these prospectuses, and have sustained damage in consequence thereof (*u*). To support the action, the

(*p*) *Boyd v. Croydon Rail. Co.*, 4 Bing. N. C. 669.

(*q*) As to the recovery of money paid on the strength of fraudulent representations of the condition of trading companies, *Womner v. Shairp*, 4 C. B. 439. *Watson v. Earl Charlemont*, 12 Q. B. 856.

(*r*) *Gerhard v. Bates*, 2 Ell. & Bl. 490.

(*s*) *Scott v. Dixon*, 29 Law, J., Q. B. 62 n. *Bedford v. Bagshaw*, ib. 59.

(*t*) *Ante*, p. 634. *Taylor v. Asheton*, 11 M. & W. 415.

(*u*) *Clarke v. Dixon*, 28 Law, J., C. P. 225; 6 C. B. N. S.

plaintiff must prove that he acted on the faith of the representation, and sustained actual pecuniary damage in consequence thereof (x).

Breach of warranty amounting to a fraud—Warranties by vendors in order to procure a purchaser.—Whenever the representation or statement amounts to a warranty of the fact stated, and is untrue, it is fraudulent, in contemplation of law, whether there was knowledge or want of knowledge of the untruth on the part of the person making it. "If one man," observes Lord Ellenborough, "lull another into security as to the goodness of a commodity he offers for sale, by giving him a warranty of it, it is the same thing whether or not the seller knew it at the time to be unfit for sale: the warranty is the thing which deceives the buyer who relies on it, and is thereby put off his guard, and it is sufficient to prove the warranty broken to establish the deceit" (y). If, therefore, a watchmaker warrants a watch to go well, or a horse-dealer warrants his horse to be sound or quiet and free from vice, or a wine-merchant warrants his claret to be in a fit and proper state for exportation, or a copper-manufacturer warrants his copper to be fit for sheathing vessels, and a purchaser buys upon the faith of the warranty, and then finds that the watch will not go, or that the horse is unsound or vicious, or that the claret is sour, or that the copper is unfit for sheathing his vessel, this is a fraud, though neither the watchmaker, the horse-dealer, nor the copper-manufacturer was aware of the fact at the time he gave the warranty (z). A warranty will not bind a man in a thing that is apparent; as to warrant that a horse has both his eyes, when he is manifestly blind of one of them, or that a house is in perfect repair, when it has neither roof nor windows (a). To warrant a thing that may be perceived at sight is not good (b). If, therefore, at the time of the sale of a horse the animal is warranted sound, that is understood to mean, saving those manifest and visible defects which were obvious to all mankind, and known to the purchaser at the time he bought the animal (c). But a purchaser who relies upon a warranty is not bound to make any particular examination of a horse before he buys, to ascertain whether a defect exists. If, relying upon the warranty, he fails to make any particular examination of the animal, and fails consequently to discover a defect, which might have been ascertained by examination, he is, nevertheless, entitled to maintain an action for deceit (d).

(x) *Eastwood v. Bain*, 28 Law, J., Exch. 74; 7 W. R. 90.

(y) *Williamson v. Allison*, 2 East. 450.

(z) *Wallace v. Jarman*, 2 Stark. 162; *Anon. Loft.* 146. *Gresham v. Postan*, 2 C. & P. 540. *Williamson v. Allison*, 2 East. 446. *Jones v. Bright*, 3 M. & P. 173.

(a) *Ekins v. Tresham*, 1 Lev. 102. *Dyer v. Hargrave*, 10 Ves. 507.

(b) *Baily v. Merrell*, 3 Bulstr. 95.

(c) *Margetson v. Wright*, 5 M. & P. 606; 7 Bing. 603.

(d) *Holyday v. Morgan*, 28 Law, J., Q. B. 9.

The purchaser of a warranted but worthless article is entitled to maintain an action for deceit, although it is stipulated that if he dislikes the article it shall be exchanged for another of the same value (e).

Proof of warranty — Warranties made pending a negotiation for the sale of property. — "As to selling with a warranty," observes Holt, C. J., "that will be so, though the warranty be before the sale; as if, upon a treaty about the buying of certain goods, the buyer should ask the seller if he would warrant them to be of such a value, and to be his own goods, and the seller should warrant them, and then the buyer should demand, and the seller set the price, and then the buyer should take time to consider for two or three days, and then should come and give the seller his price; though the warranty here was before the sale, yet this will be well, because the warranty is the ground of the treaty, and this is selling with a warranty. But it is otherwise if the warranty be after the sale; as if a man sells goods and afterwards warrants them, such warranty is not good. But in the other case the warranty is part of the contract" (f).

Private representations made prior to a sale by auction forming no part of the publick contract of sale. — If what passes between a vendor and purchaser form no part of the negotiation ending in the purchase, it cannot be treated as a warranty. Thus in the case of a sale by auction, you cannot "tack on a previous private communication to what is said by the auctioneer at the time of the actual publick sale, in order to constitute a warranty. To permit such a practice," observes Maule, J., "would be to encourage a fraud upon all others attending the sale." If, therefore, a horse is advertised to be sold by auction without a warranty, and the owner privately represents the horse to be sound and free from vice, to a party who attends the sale, and bids for and purchases the horse in reliance on the representation, the representation cannot be treated as a warranty. Those who bid at a publick auction, bid against each other on the supposition that they all stand upon an equal footing; and if the sale is announced and conducted as a sale without a warranty, and the biddings are made upon that understanding, any secret underhand bargain for a warranty would be a fraud (g).

Representations amounting to a warranty — False representations by a party of his knowledge of a particular fact, where the means of knowledge lie peculiarly or exclusively within his reach. — Many representations made by one man to another have been made under such circumstances, that the party making them may fairly be considered to warrant or vouch his knowledge of their

(e) *Wallace v. Jarman*, 2 Stark. 162.

(f) *Lymey v. Selby*, 2 Ld. Raym. 1120.
Salk. 211. *Osham v. Barry*, 15 C. B. 597; 24 Law, J., C. P. 100. *Roscorla v.*

Thomas, 3 Q. B. 286.

(g) *Hopkins v. Tanqueray*, 15 C. B. 180; 23 Law, J., C. P. 162.

truth and accuracy, so as to be estopped from afterwards setting up his want of knowledge. If the means of information lie peculiarly or exclusively within his reach, and he pretends to know the truth of the matter, he must be taken to warrant his knowledge of the fact, and his want of knowledge constitutes a fraud. The owner of a horse who has used and driven it, or has had the means of doing so, has superior power of information to a stranger who knows nothing, and professes to know nothing, whatever about the animal. If, therefore, the owner offers the horse for sale, every representation that he makes to the buyer respecting the qualities and capability of the animal amounts to a warranty, although the word warrant is never used by him (*h*). If a horse offered for sale has a cough and running at the nose, and the vendor says that it is a mere cold, and that he will deliver the horse sound and free from blemish in a week, this amounts to a warranty to a purchaser that the horse has nothing more than a cold upon him (*i*). "If a purchaser," observes Best, C. J., "asks for a carriage-horse, or a horse fit to carry a lady, or a timid or infirm person, the seller, who knows the qualities of the horse he supplies in answer to the demand, undertakes, on every principle of honesty, that it is fit for the purpose specified" (*k*).

A jeweller or a diamond merchant, who deals in diamonds and precious stones, has better means of knowing the nature and quality of the stones he sells than an unskilled stranger who comes to his shop to buy them. If, therefore, he represents a glittering stone to be a diamond, he impliedly warrants his knowledge of the truth of his representation. His statement amounts to a warranty of the fact to a purchaser, and the jeweller is responsible if the stone turns out to be only a piece of crystal, whether he knew the representation to be true or false (*l*). Where the vendor of a ship published a written description of the vessel, and represented the hull to be nearly as good as when launched, whereas it was worm-eaten and unseaworthy, and the keel was broken, and it appeared that the vendor had caused the description to be written and circulated without having examined the bottom of the vessel, and without knowing whether the description was true or false, and the vessel was afloat and the hull covered with water, so that the purchaser had no means of examining the hull himself, it was held that the vendor must be considered to have warranted the fact to be as he asserted, and that his want of knowledge constituted a positive fraud. "If he made the representation," observes Lord Mansfield, "not knowing at the time whether it was true or false, it is a fraud, if, in point of fact, it turns out to be false. It is equally

(*h*) *Cave v. Coleman*, 3 M. & R. 4.

Salmon v. Ward, 2 C. & P. 211.

(*i*) *Liddard v. Kain*, 9 Moore, 356.

(*k*) *Jones v. Bright*, 8 M. & P. 175.

(*l*) *Chandelor v. Lopus*, 1 Smith's Lead. Cas. 77, 78.

false and fraudulent for a man to affirm his knowledge of that of which he knows nothing, as to aver that to be true which he knows is not true" (m).

Representations concerning matters which are obvious to ordinary intelligence, and which lie as much within the knowledge of one party as the other.—Where the real quality of the thing is an object of sense obvious to ordinary intelligence, and the parties making and receiving the representation have equal knowledge or means of acquiring information, and the correctness or incorrectness of the representation may be ascertained by the party interested in knowing the truth, by the exercise of ordinary inquiry and diligence, and the representation is not made for the purpose of throwing the latter off his guard, and preventing him from making those inquiries and examinations which every prudent person ought to make, there is no warranty of the party's knowledge of the truth of his representation, or of the fact being as it is stated to be (n). In an action for deceit, it appeared that the defendant having a load of wood to be carried, came to the plaintiff, who was a carrier, and bargained with him for the carriage of it at 2s. a hundredweight, representing that there were eight hundredweight; whereupon the plaintiff, relying upon the representation, caused the wood to be put into his cart and carried, but finding that he had got an overpowering load, and having killed two of his horses in dragging it along, he caused the wood to be weighed, when he found the weight to be twenty hundredweight; and thereupon he brought his action to recover compensation for the damage he had sustained by reason of the deceit, and it was held that the action was not maintainable, as it was his own fault not to have weighed the wood before he put it into his cart. "There is a difference," observes Dodderidge, J., "where the carrier is absent and where he is present; for where the carrier is there present, it is very easy for him to see the difference between 800 and 2000 weight" (o).

If a man selling wares sells purple to one, saying to him, "this is scarlet," the statement is to no purpose, for that the other may perceive this, and this gives no cause of action to him. And if a man selling a horse represents him to be sound in wind and limb, this representation is confined to such defects as were not manifest and apparent to all observers. If, therefore, the horse was manifestly blind, or obviously lame, and the purchaser examined the animal before he bought it, and must have been aware of these patent defects, the vendor's representation will give no cause of action (p). If, however, the manifest defect is not necessarily of a permanent nature; if a horse has a cough and running at

(m) *Schneider v. Heath*, 3 Campb. 508.
Parson v. Watson, Cowp. 788. *Adamson v. Jarvis*, 4 Bing. 79.

(n) *Clapham v. Skillito*, 7 Beav. 150.

Scott v. Hanson, 1 Sim. 14.

(o) *Baily v. Merrell*, 3 Bulstr. 95.

(p) *Ib.* 95. *Margelson v. Wright*, 5 M. & P. 610; 7 Bing. 603.

the nose, and the vendor says that it is merely a cold, and that the horse will be sound and well in a given time, and the purchaser buys in reliance upon the truth of the representation, the vendor, as we have seen, will be responsible in damages if the horse continues unsound and permanently diseased (q).

Representations amounting merely to expressions of opinion and belief.—When the representation is made concerning something which is mere matter of opinion, which every man can exercise his own judgment upon and inquire about, it is the plaintiff's own fault if he suffers himself to be deceived. If the party giving his opinion, or expressing his belief, does not possess any exclusive means of knowledge, and merely says that which he thinks to be true, there is no fraud, however erroneous may be the statement he has made. If, therefore, a defendant having reason to believe, and actually believing a particular fact to be true, has represented it as such to the plaintiff, he is not, as we have seen, liable to an action merely because it turns out that he was mistaken, and that his representation was false (r). If the vendor of a picture states it to be the work of a particular artist, it is always a question for the jury to determine whether the statement amounted to a mere expression of the vendor's own opinion and belief upon a matter concerning which the buyer was to exercise his own judgment, or whether it was intended and understood to be a positive affirmation or warranty of the fact (s). The credit to which a man is entitled in the commercial world, is a matter which does not lie exclusively within the knowledge of any one person. It is to a great extent matter of judgment and opinion, on which different men will form different opinions, and if a man in answer to inquiries respecting the solvency or credit of a particular individual, or of a partnership, or joint-stock company, does no more than state his own honest opinion, believing what he says to be true, he is not responsible for the correctness of the opinion, and does not warrant the fact to be as represented by him (t).

Statements in answer to inquiries.—*Information to sheriffs and public officers.*—If a sheriff about to seize the goods or the person of a debtor under a writ of execution, makes inquiry of another as to whether certain goods do or do not belong to such debtor, or as to the identity of the person of the debtor, and the party applied to for information does no more than represent what he believes to be true, he is not responsible in an action for deceit if the information he gives turns out to be false, and the sheriff who has acted upon it believing it to be true has been damnified; but if a party officiously interferes and gives directions to the sheriff, he

(q) *Liddard v. Kain*, 9 Moore, 356.(r) *Collins v. Evans*, 5 Q. B. 826.(s) *Jendwine v. Slade*, 2 Esp. 572. *De**Sewhanberg v. Buchanan*, 5 C. & P. 343.(t) *Haycraft v. Oresay*, 2 East. 105.

may make himself responsible for trespasses committed by the sheriff whilst acting in obedience to those directions, and may become liable to make good any damages which the sheriff himself has been obliged to pay in consequence of his having obeyed such directions (u).

Representations made by vendors on sales of real property amounting to a warranty.—If, pending a negotiation for the sale of real property, the vendor affirms the rents to be more than they really are, and the party to whom the affirmation is made relies upon it and purchases the property, the vendor is liable to an action for deceit, whether he knew or did not know of the falseness of the affirmation at the time it was made, and although a conveyance is subsequently executed which contains no notice of any such affirmation. A representation of this sort has been held to amount to a warranty of the fact, on the ground that the vendor had better means of knowledge than the purchaser, who relied upon the truth of the statement and was deceived by it; “for,” says Gould, J., “the value of the rents was a thing hard to be known, and secret, known to none but the landlord and his tenants, and they might be in confederacy together.” “If,” observes Holt, C. J., “the vendor gives in a particular of the rents, and the vendee says he will trust him and inquire no further, but rely upon his particular, there, if the particular be false, an action will lie; but if the vendee will go and inquire further what the rents are, there it seems unreasonable he should have any action, though the particular be false, because he did not rely upon the particular” (x).

Where the vendor of a public-house made, pending the treaty for the sale of the house, sundry false representations to the plaintiff concerning the amount of business done in the house, and the rent received for part of the premises, whereby the plaintiff was induced to give a larger sum than he would otherwise have given for the property, it was held that the plaintiff was entitled to maintain an action against the defendant for the deceit (y).

False representations of title by vendors of corporeal and incorporeal hereditaments—Representations not amounting to a warranty.—Representations and assertions of title by a vendor of real property, where the title-deeds are submitted to the inspection of the purchaser, who exercises his own or such other judgment as he confides in on the goodness of the title, amount only to expressions of opinion and belief, and cannot be treated as a warranty (z). Every prudent purchaser of real property looks into the title of the vendor before he accepts a conveyance and pays the

(u) *Collins v. Evans*, 5 Q. B. 830; ante, p. 417.

(x) *Lysney v. Selby*, 2 Ld. Raym. 1120. *Ekins v. Tresham*, 1 Lev. 102.

(y) *Dobell v. Stevens*, 3 B. & C. 623. *Canham v. Barry*, 15 C. B. 597.

(z) *Roswell v. Vaughan*, Cro. Jac. 196.

purchase-money, and he has a right to have a covenant for title on the part of the vendor inserted in the deed of conveyance; and if he waives his right of examination and approval of the title, and does not think fit to require any covenant for title on the part of the vendor, he must be presumed to have been content to take whatever estate or interest in the land the vendor might chance to possess, and when the vendor's title, such as it is, is actually conveyed to him, the rule of caveat emptor applies (a). But if a representation as to title was false, to the knowledge of the party making it, and was made for the purpose of preventing inquiry and covering a fraud, then it may be made the foundation of an action for deceit, although the party receiving and acting upon the representation had accepted a conveyance, without requiring any covenant for title.

Representations of title on sales of chattels amounting to a warranty.—“Where one having the possession of any personal chattel sells it, the bare affirming it to be his,” observes Holt, C. J., “amounts to a warranty, and an action lies on the affirmation; for his having possession is a colour of title, and perhaps no other title could be made; aliter where the seller is out of possession, for there may be room to question the seller's title, and caveat emptor in such a case to have either an express warranty or a good title” (b). Mr. Justice Buller, however, has disclaimed any distinction between the vendor's being in or out of possession, treating the affirmation as equivalent to a warranty in both cases (c), the true principle being “that he who affirms either what he does not know to be true, or knows to be false, to another's prejudice and his own gain, is both in morality and law guilty of falsehood, and must answer in damages” (d). If a man does not sell as owner, but in some special character or capacity, such as sheriff or pawnbroker, and does not make any representation as to title, he is presumed to sell only such a title as he actually possesses (e).

False representations by manufacturers of the character and quality of the articles they manufacture and sell.—The manufacturer of an article has superior means of information as to the nature and quality of the article he makes than a stranger not engaged in the manufacture. If, therefore, he represents the article he makes to be of some superior or peculiar quality, or to be fit for some particular purpose, in order to recommend it to a purchaser, his representation amounts to a warranty of the fact.

(a) *Bree v. Holbeck*, 2 Doug. 655; Ld. Alvanley, C. J., 8 B. & P. 170. *Duke v. Barnett*, 2 Coll. Ch. C. 337. *Maynard v. Moseley*, 3 Swanst. 655.

(b) *Medina v. Stoughton*, 1 Salk. 210. *Crosse v. Gardner*, Carth. 90.

(c) *Pasley v. Freeman*, 3 T. R. 58.

(d) Per Best, C. J., *Adamson v. Jarvis*, 4 Bing. 78. *Furnis v. Leicester*, Cro. Jac. 474; 1 Roll. Abr. 90, pl. 6.

(e) *Chapman v. Speller*, 14 Q. B. 824. *Morley v. Attenborough*, 3 Exch. 500.

"It is not necessary," observes Best, C. J., "that the seller should say, 'I warrant;' it is sufficient if he says that the article he sells is of a particular quality, or fit for a particular specified purpose." Where therefore, the plaintiff, a shipowner, on being introduced to the defendant, a copper-manufacturer, stated that he wanted some copper for sheathing a vessel, and the defendant said, "We will supply you well," whereupon the plaintiff gave an order for some copper, it was held that this amounted to a warranty on the part of the copper-manufacturer that the copper he supplied to the plaintiff in execution of the order should be fit for sheathing vessels, and that he was responsible in an action for deceit for furnishing defective copper unfit for that purpose. "This," observes Best, C. J., "will tend to protect the purchaser, who is necessarily ignorant of the nature of the article sold, from imposition, whilst the person who manufactures it must, or ought to, know its particular virtues and qualities" (*f*). But when the purchase is of a well-known ascertained article, and the manufacturer represents that it is fit for the purpose for which it is made, and for which it is generally used, there is no warranty on the part of the vendor that it is fit for any peculiar or special purpose for which the purchaser requires it (*g*).

A person who receives the order and gets the article made is as much the manufacturer of it as the person who actually makes it. Thus, where the defendant sent to the plaintiff's shop for a crane-rope, and the defendant said that he would get one made, and sent his foreman to the plaintiff's premises to take the dimensions of the rope, and the foreman was shown the crane, and told that the rope was wanted for the purpose of raising pipes of wine from the cellar, it was held that the defendant must be taken to be the manufacturer of the rope, although it was not made on his premises, but by a ropemaker he had himself employed, and that there was an implied warranty on his part that the rope was fit for the purpose for which it was known to be required (*h*).

Representations by a vendor who is told that the purchaser wants the article he proposes to buy for a particular purpose.—If a stranger goes to a shop and tells the shopkeeper that he wants an article fit for a particular specified purpose, and it is the clear understanding of the parties that the purchaser relies upon the skill and judgment of the shopkeeper for the supply of an article fit for the purpose specified, there is an implied warranty on the part of the shopkeeper that the article he furnishes is reasonably fit for that purpose. "It appears to me," observes Tindal, C. J., "to be a distinction well founded, both on reason and on authority,

(*f*) *Jones v. Bright*, 3 M. & P. 174; 5 Bing. 533. *Camac v. Warriner*, 1 C. B. 367.

(*h*) *Brown v. Edgington*, 2 M. & Gr.

(*g*) *Chanter v. Hopkins*, 4 M. & W. 390. 279.

that if a party purchases an article upon his own judgment, he cannot afterwards hold the vendor responsible, on the ground that the article turns out to be unfit for the purpose for which it was required; but if he relies upon the judgment of the seller, and informs him of the use to which the article is to be applied, it seems to me the transaction carries with it an implied warranty that the thing furnished shall be fit and proper for the purpose for which it was designed" (i).

False representations by vendors of the character and quality of the goods they sell to absent purchasers, who have no means of inspection, and of exercising their own judgment upon them—Representations amounting to a warranty.—Wherever the purchaser has no opportunity of inspecting the commodity he buys, the rule of caveat emptor does not apply. Every representation, therefore, made by a vendor to an absent purchaser, as to the quality or fineness of the article he offers for sale, amounts to a warranty of the fact to such absent purchaser, who has no means of judging for himself, but relies exclusively on the judgment and good faith of the vendor (k). If a purchaser orders a particular article to be forwarded to his agent abroad for a foreign market, and the vendor executes the order, and pretends, or represents, that he has sold the particular article required, and the purchaser has had no opportunity of inspection or examination, the representation of the vendor amounts to a warranty of the fact (l). If an article, represented to be of a particular or peculiar quality, turns out to be of a substantially different or inferior quality, it does not accord with the representation, and damages are therefore recoverable (m). "A seller," observes Lord Ellenborough, "is unquestionably liable to an action for deceit if he fraudulently misrepresents the quality of the thing sold to be other than it is in some particulars which the buyer has not equal means with himself of knowing, or if he do so in such a manner as to induce the buyer to forbear from making the inquiries, which for his own security and advantage he would otherwise have made" (n).

False representations of the quality of goods by vendors where the purchaser has the means of inspection and examination, and forming his own judgment of their character and quality.—But whenever the vendor is not himself the manufacturer of the goods he sells, and the purchaser is afforded the means of inspection and examination, and of forming his own judgment of their quality, the representations made by the vendor of the quality of the goods amount merely to assertions of his own opinion and

(i) Tindal, C. J., ib. 290.

(*) Ld. Ellenborough, *Gardiner v. Gray*, 4 Campb. 145.

(l) *Bridge v. Wain*, 1 Stark. 504.

(m) *Wieler v. Schilizzi*, 25 Law, J., C. P. 90.

(n) *Vernon v. Keys*, 12 East. 637.

belief, and not to a warranty. If, therefore, the representation is honestly made, and is believed at the time to be true by the party making it, it does not constitute a fraud in law, though it was not true in point of fact.* The rule of *caveat emptor* applies, and the representation does not furnish a ground of action (o).

Sale of goods by sample.— Every person who exhibits a sample of goods for sale, impliedly represents or warrants that the sample has been fairly taken from the bulk of the commodity, and he does no more than this. The purchaser takes the risk of all latent defects and infirmities inherent in the article, and unknown to the seller, whether they arise from natural causes or fraudulent dealings with the goods by parties through whose hands they have passed. Thus, where the plaintiff bought hops of the defendant, whom he knew not to be the grower, by samples taken from the pockets in which the commodity was closely packed, and at the time of the sale the samples answered fairly to the commodity in bulk, and no defect was perceptible at that time to the buyer; but owing to the grower of the hops having fraudulently watered them after they were dried, to increase their weight, they gradually deteriorated in quality, and became utterly unsaleable shortly after their removal to the defendant's warehouse, it was held that the defendant, who had fairly drawn and exhibited the samples, and was wholly ignorant of the fraud at the time of the sale, was not responsible for the latent defect afterwards discovered in the hops, although it rendered them unmerchantable and of no value in the hands of the buyer. Here the vendor and purchaser had both equal means of knowledge. Both examined the sample, and neither of them discovered, or had the least idea of the defect which was afterwards disclosed by the gradual process of heating. The maxim of *caveat emptor*, therefore, applied. "The purchaser," observes Grose, J., "had an opportunity of judging by the samples, such as he found them at the time. If he doubted the goodness, or did not choose to incur any risk of a latent defect, he might have refused to purchase without a warranty. If an express warranty be given, the seller will be liable for any latent defect according to the old law concerning warranties. But if there be no such warranty, and the seller sell the thing, such as he believes it to be, without fraud, the law will not imply that he sold it on any other terms than what passed in fact" (p).

So where cotton had been fraudulently packed in America, the interior of the bales being filled with bad, unmerchantable cotton, and the outer part of the bales from whence the samples would be taken with cotton of superior quality, and the cotton so falsely packed was consigned

(o) *Orinrod v. Huth*, 14 M. & W. 664.

(p) *Parkinson v. Lee*, 2 East. 320.

to a Liverpool merchant, who drew samples in the ordinary way, and exhibited them to the plaintiff, who purchased and received forty-five of the bales, and then brought his action against the defendant for the deceit, it was held that the action was not maintainable unless the jury could see grounds for inferring that the defendants or their brokers were acquainted with the fraud that had been practised in the packing of the bales, or had themselves acted in the matter against good faith, or with some fraudulent purpose (*q*). And generally, if it was to be understood that there was to be a purchase of the article shown by sample, and the sample is fairly taken from the bulk, there is no misrepresentation or deceit, although the vendor may have given an incorrect description of the age or quality of the article, provided the description was honestly given in full belief of its truth (*r*).

False representations by railway companies of the time of the starting of their trains—Representations amounting to a warranty.—It has been held that railway companies must be taken to warrant the truth of the representations made by them in their published time-tables as to the time of the starting of their trains, so that if the representation is untrue, it is what the law calls a fraudulent representation, and may be made the foundation of an action for deceit by any person who has relied upon the representation, and has sustained damage in consequence thereof (*s*).

False representation of authority—Pretended agency—Deceit by agents.—If the vendor of goods affirm that the goods he sells are the goods of a stranger, his friend, and that he had authority from him to sell them, and upon that B buys them, when, in truth, they are the goods of another, yet if he sell them falsely and fraudulently on this pretence of authority, though he do not warrant them, and though it be not averred that he sold them, knowing them to be the goods of the stranger, yet B shall have an action for this deceit (*t*). If an agent who has no authority to make a contract in the name of his principal, and knows it, nevertheless makes the contract as having such authority, he is responsible in an action for deceit, “for he induces the other party to enter into the contract on what amounts to a misrepresentation of a fact peculiarly within his own knowledge; and it is but just that he who does so should be considered as holding himself out as one having competent authority to contract, and as guaranteeing the consequences arising from any want of such authority. Where also a party making a contract as agent *bonâ fide* believes that he has authority, but has in fact no authority, he is

(*q*) *Ormod v. Huth*, 14 M. & W. 683.

(*r*) *Carter v. Crick*, 4 H. & N. 412; 28 Law, J., Exch. 238.

(*s*) *Denton v. Gt. Northern Rail. Co.*, 5 Ell. & Bl. 867; 25 Law, J., Q. B. 129.

(*t*) 1 Roll. Abr. 91, pl. 7.

still personally liable. It is a wrong, differing only in degree, but not in its essence, from the former case, to state as true what the individual making such statement does not know to be true, even though he does not know it to be false, but believes without sufficient grounds that the statement will ultimately turn out to be correct; and if that wrong produces injury to a third person, who is wholly ignorant of the grounds on which such belief of the supposed agent is founded, and who has relied on the correctness of the assertion, it is equally just that he who makes the assertion should be personally liable for its consequences (*u*). "One person may," observes Erle, J., "assert he has authority to make a contract on behalf of another, and *bonâ fide* believe it, and yet it may be deceit if he makes the positive assertion without disclosing the grounds on which he erroneously, as it turns out, believes it" (*x*).

Where, therefore, the defendant had represented himself to be the agent of one Gardner, and as such authorized to let an estate to the plaintiff, and the defendant had no authority to let the property, although he believed that he had, and in consequence of that mistake the plaintiff was induced to lay out money upon the estate, relying on the representation, it was held that the defendant was liable for all the expenses incurred by the plaintiff on the strength of the representation (*y*). "I am of opinion," observes Willes, J., "that a person who induces others to contract with him as the agent of a third party, by an unqualified assertion of his being authorized to act as such agent, is answerable to the person who so contracts for any damages he sustains by means of the assertion of the authority being untrue. This is not the case of a bare misstatement to a person not bound by any duty to give information. The fact that the professed agent honestly thinks that he has authority affects the moral character of his act, but his moral innocence, in so far as the person he has induced to contract is concerned, in no way aids him, or alleviates the inconvenience and damage which he sustains. If one of the two in such cases is to suffer, it ought not to be the person who has been guilty of no error, but he who by an untrue assertion believed and acted upon, as he intended it should be, and touching a subject within his peculiar knowledge, and as to which he gave the other party no opportunity of judging for himself, has brought about the damage. The obligation arising in such a case is well expressed by saying that the person professing to contract as agent for another, impliedly

(*u*) Alderson, B., *Smout v. Ilbery*, 10 M. & W. 9. *Polhill v. Walter*, 3 B. & Ad. 114.

(*x*) *Jenkins v. Hutchinson*, 13 Q. B.

748. *Randell v. Trimen*, 18 C. B. 786; 25 Law, J., C. P. 307.

(*y*) *Collen v. Wright*, 8 Ell. & Bl. 647; 20 Law, J., Q. B. 147; 27 ib. 215.

undertakes with the person who enters into such a contract upon the faith of his being duly authorized, that the authority he professes to have does in point of fact exist" (z).

If the authority is of a publick nature, or the grounds of it are known to the other contracting party, and the agent does no more than express his own opinion and belief as to the nature and extent of the authority vested in him, and manifest an intention merely to bind the principal if he has power so to do, and guard himself against any positive representation of authority, he will not then be responsible if it should turn out that he had not the power he was supposed to possess (a).

A mistake made by an agent in describing the quantity of goods he had bought for his principal, or the time of their delivery, or the price to be paid for them, may render such agent liable for negligence or a breach of duty, but does not render him liable to an action for deceit (b); it is otherwise, however, if he knowingly makes a false representation with intent to deceive his employer (c).

False assumption of authority, as between master and servant, employer and employed.—Every man who employs another to do an act which the employer assumes to have, and appears to have a right to authorize him to do, impliedly warrants that he has the authority he pretends to have, as the means of knowledge are peculiarly within his power; and if he has no such authority he is guilty of deceit, and must indemnify his servants or agents for all such wrongful acts as have been done by them in obedience to his commands, and which would have been lawful if the employer had the authority he pretended to have (d). If a landlord employs a bailiff, and represents that he has a right to distrain on a tenant for rent, and signs a distress warrant, and delivers it to the bailiff to be executed, and it turns out that the landlord had no right to distrain, and the bailiff has to pay damages for the unlawful distress, he may maintain an action against the landlord for deceit, although the landlord made the representation believing it to be correct, and without any intention to deceive (e).

Counterfeiting trade marks—Fraudulent use by one person of the trade mark of another with intent to deceive.—If a manufacturer has adopted a particular mark to denote that the goods so marked were made by him, and the mark has become known and understood in the trade, he who uses the mark for the purpose of deceiving purchasers and making them believe the goods to be the goods of the manufacturer who has introduced

(z) Willes, J., *Collen v. Wright*, 27 Law, J., Q. B. 217.

(a) *Macgregor v. Deal & Dove, &c.*, 22 Law, J., Q. B. 69.

(b) *Thorn v. Bigland*, 8 Exch. 729.

(c) *Pewtriss v. Austen*, 6 Taunt. 522.

(d) Best, C. J., *Adamson v. Jarvis*, 4 Bing. 72.

(e) *Rawlings v. Bell*, 1 C. B. 959.

the mark, is guilty of a false and fraudulent representation, and if this produces damage to another, the party injured is entitled to an action for the deceit (*f*). Where "a clothier in Gloucestershire sold very good cloth, so that in London if they saw any cloth of his mark they would buy it without searching thereof; and another who made ill cloth put the Gloucestershire mark upon it, and an action was brought by him who bought the cloth for this deceit, it was adjudged maintainable" (*g*). The manufacturer, also, who is damnified in having goods fraudulently palmed upon the world as goods made by him when in truth they are not so, is also entitled to an action for the deceit (*h*). He does not, in an action of this sort, claim any abstract right to the exclusive use of the mark in question. He merely says that, having adopted a particular mark to denote that the goods so marked were made by him, and the mark having become known and understood in the trade, the publick were led to believe that goods so marked were of his manufacture, and that the defendant marked his goods with a mark resembling the plaintiff's mark with a view to deceive the publick to purchase the same as and for the plaintiff's goods, and by reason thereof the plaintiff sustained damage (*i*).

Fraudulent assumption of the name of a bank.—Where the declaration in an action against a banking corporation stated that the plaintiff had established in the city of London a bank called the Bank of London, and had caused that name to be affixed on the offices of the bank, and had made the bank well known as the only bank of London, and that the defendant, after the plaintiff's bank had been so established, and whilst it was the only bank styled the Bank of London, wrongfully established another bank in the city of London under the name of the Bank of London, and as representing the plaintiff's bank, and under the pretence that the bank so established was the plaintiff's bank, whereby the plaintiff was injured in his business, &c., it was held that the declaration disclosed no cause of action; but it seems to have been thought that, if it had been averred and shown that the plaintiff carried on the business of a banker under the name and style of the Bank of London, and that whilst he was so carrying on business the defendant came and established another bank of the same name, and carried on business under that name, for the purpose of making it believed that the plaintiff's business was carried on at the defendant's bank, and so drew away customers from the plaintiff's bank, there would have been a good cause of action (*k*).

Deceit by provision-dealers in selling unwholesome food.—Every general

(*f*) *Crawshaw v. Thompson*, 4 M. & Gr. 366 n.

(*g*) 33 Eliz. cited by Dodderidge, J., Cro. Jac. 471.

(*h*) *Dodderidge, J.*, Poph. 144.

(*i*) *Rowlgers v. Nowill*, 5 C. B. 127.

(*k*) *Lawson v. Bank of London*, 18 C. B. 84; 25 Law, J., C. P. 188.

dealer in provisions offered for sale as food for man, is bound by law to know the quality of the article he sells, and if he sells corrupt and unwholesome food, whereby the plaintiff is injured, he is liable to an action for deceit (*l*); but an ordinary individual, not being a dealer in provisions, who sells unsound meat, cannot be made responsible in damages unless it is shown that he sold it as sound and good meat, knowing it at the time to be unsound and unfit for food (*m*).

False and fraudulent representations by married women and infants.—

Neither a married woman nor her husband can be sued for a false and fraudulent representation by such married woman that she was a *feme sole*, whereby she induced the plaintiff to make a contract with her, which he could not enforce by reason of her being married (*n*). Nor can an infant be sued for a false and fraudulent representation that he was of full age, whereby the plaintiff was induced to contract with him (*o*).

Fraudulent concealment.—A *suppressio veri*, or concealment of the truth, will alone, in certain cases, and under certain circumstances, amount to a fraud, and give rise to an action for deceit. Where on the sale of a house the seller, being conscious of a defect in a main wall, plastered it up and papered it over, it was held, that as the vendor had expressly concealed the defect, the purchaser might recover damages in an action for deceit (*p*). And where on a sale of goods the vendor knew that he had no title to the goods he sold, and failed to disclose the fact to the purchaser, it was held that the latter was entitled to maintain an action for damages “on the ground that he had been deceived, and was the worse for the deceit, and that he was entitled to recover to the extent to which he had been damaged by the deception” (*q*). So, where an auctioneer sold a lease which he knew to have been forfeited in consequence of a breach of covenant by the lessee, and failed to disclose the forfeiture, and the plaintiff bought the lease in ignorance of the breach of covenant and forfeiture, it was held that the auctioneer had been guilty of a deceit, and was responsible in damages to the plaintiff (*r*).

If it is a custom of trade for a vendor of merchandize to disclose particular defects at the time of the sale, if he is cognizant of their existence, the vendor will be responsible in damages for a fraudulent concealment if, knowing of the particular defect, he fails to make the customary disclosure (*s*). And if the vendor is cognizant of any serious secret defect

(*l*) Year Book, 9 Hen. 6, 53; 1 Roll. Abr. 90, P. pl. 2.

(*m*) *Burnby v. Bollett*, 16 M. & W. 644.

(*n*) *Liverpool Adelphi, &c. v. Fairhurst*, 9 Exch. 420.

(*o*) *Ib., Johnson v. Pye*, 1 Sid. 258.

(*p*) Anon. cited by Gibbs, J., *Pickering v. Dowson*, 4 Taunt. 785.

(*q*) Gibbs, C. J., *Peto v. Blades*, 5 Taunt. 659.

(*r*) *Stevens v. Adamson*, 2 Stark. 422.

(*s*) *Jones v. Bowden*, 4 Taunt. 846.

materially deteriorating the value of the goods in the market, and nevertheless offers them for sale at the ordinary market price, and knows that the purchaser is deceived by the appearance of the goods at the time of the sale, and is labouring under a gross delusion respecting them, and the vendor takes no trouble to rectify the mistake and disclose the real facts to the purchaser, he is responsible in damages for wilful deceit (*t*). But if the defect is patent and can readily be discovered by proper examination, and the purchaser has the means of examination at hand, there is no fraudulent concealment, and the maxim of *caveat emptor* will apply. But the vendor must in no case resort to any art or contrivance to conceal a defect, for if he does he will be answerable, as we have seen, for wilful deceit (*ante*, p. 651). "If I sell a horse that has lost an eye, no action lies against me for so doing; but if I sell him with a false and counterfeit eye, there an action lieth" (*u*). If the vendor of a glandered horse has resorted to any doctoring or contrivance for the purpose of suppressing the marks of the disease, and has thereby deceived the purchaser, the latter will be entitled to recover all the damages he has sustained by the deception; but in a general sale of a horse, when there is no warranty, the rule of *caveat emptor* applies; and, except there be a deceit, either by a fraudulent concealment or fraudulent misrepresentation, no action for unsoundness lies by the vendee against the vendor of the animal (*x*).

Fraudulent concealment of the dangerous nature of articles delivered to a bailee to be warehoused or carried.—Every person who conceals in boxes and packages articles known by him to be of an explosive, corrosive, or combustible and dangerous nature, and delivers them to another to be warehoused or carried with other goods by land or by sea, and fails to disclose the dangerous nature of the articles to the bailee, is guilty of a tortious act, and is responsible for all the consequences of his carelessness, unless the bailee knew of the dangerous nature of the articles, and the danger and risk attendant upon the receiving and dealing with them. And it is no answer to aver that the articles were well known in trade and commerce, and that the plaintiff knew what they were, without an express averment that he knew them to be dangerous (*y*).

"It is clearly a tortious act," observes Crompton, J., "for the consequences of which shippers are responsible, to ship goods apparently safe and fit to be carried, and from which the shipowner is ignorant that any

(*t*) *Hill v. Gray*, 1 Stark. 434.

(*u*) "Si jeo vend chivall que ad null oculus la null action gist, auterment lou il ad un counterfeit faux et bright eye!" *Southerne v. Howe*, 2 Rolle, rep. 5.

(*x*) *Hill v. Balls*, 2 H. & N. 290; 27 Law, J., Exch. 45.

(*y*) *Hutchinson v. Guion*, 5 C. B., N. S., 149; 28 Law, J., C. P. 63; 6 W. R. 757.

danger is likely to arise, without notice of such goods being dangerous, if the shipper is aware of such danger. Such shipment when the scienter is made out is clearly wrongful and tortious; but it does not seem that there is any authority decisive on the point as to whether the shipper is liable for shipping dangerous goods without a communication of their nature, when neither he nor the shipowner are aware of the danger. It seems very difficult to hold that the shipper can be liable for not communicating what he does not know. Lord Ellenborough's dictum (z) would tend to show that knowledge of the party shipping is an essential ingredient. I entertain great doubt whether either the duty or the warranty extends beyond the cases where the shipper has knowledge, or the means of knowledge, of the dangerous nature of the goods when shipped, or where he has been guilty of some negligence as shipper, as by shipping without communicating danger, which he had the means of knowing, and ought to have communicated (a).

Fraudulent sales with all faults.—A sale of a chattel to a purchaser "with all faults" does not mean that the purchaser is to take it with all frauds. Such a stipulation, therefore, will not protect the vendor from an action for deceit, if he has resorted to any artifice to conceal a defect, or has made use of any false representation for the purpose of lulling to sleep the vigilance of the purchaser. Therefore, where a ship was sold to be taken as she lay with all faults, and it was proved that the vendor had used means to prevent purchasers from discovering certain defects in the vessel, and had also knowingly made a false representation of her condition at the time of the sale, it was held by Mansfield, C. J., that although the words "to be taken with all faults" were very large, and framed expressly to exclude the buyer from calling upon the seller for any defect in the thing sold; yet if the seller was guilty of any positive fraud in the sale, either in the making a false representation or in using means to conceal a defect, the seller would be answerable in damages to the buyer for the deceit (b). And where the vendor of a vessel which was to be taken with all faults, represented the vessel in his handbills and advertisements of the sale to have been built in 1816, whereas she had been launched the year before, and the difference of time materially affected her value, it was held that the purchaser was entitled to recover damages for the deceit, notwithstanding the stipulation that the vessel was to be taken with all faults. "The vendor," observes Abbott, C. J., "ought either to be silent or to speak the truth. In case he spoke at all, he was bound to disclose

(z) *Williams v. East Ind. Co.*, 3 East. 192.

(a) *Brass v. Maitland*, 6 Ell. & Bl. 486.

Gibbon v. Paynton, 4 Burr. 2298. *Batson v. Donovan*, 4 B. & Ald. 33, 37.

(b) *Schneider v. Heath*, 3 Campb. 507.

the real fact" (c). "The meaning of selling with all faults," observes Heath, J., "is that the purchaser shall make use of his eyes and understanding to discover what faults there are; but I admit that the vendor is not to make use of any fraud or practice to conceal a defect" (d).

Fraudulent sales with all faults, and without allowance for any defect or error or misstatement.—A stipulation that the thing sold is to be taken with all faults, and without allowance for any defect, error, or misdescription, will protect the vendor from all unintentional mistakes, misstatements, and misdescription (e), but not from the consequences of any wilful deception.

SECTION II.

OF ACTIONS FOR FRAUD AND DECEIT.

Actions for deceit—Parties to be made plaintiffs.—The person to whom a false representation was made to be acted upon, and who acted upon it, believing it to be true, and sustained damage thereby, is the party to sue for compensation; but an action may also be brought by a person to whom the representation is indirectly made, as where it is made to one man in order to be communicated to another. Where the father of the plaintiff told the defendant that he wanted to purchase a gun for the use of the plaintiff, and the defendant, in order to effect the sale, warranted the gun to have been made by Nock, and that it was a safe and secure gun, and the father then purchased the gun and delivered it to the plaintiff, who, on the faith of the warranty, and believing it to be true, used the gun, and was injured by its bursting in his hand, it was held that the plaintiff was entitled to sue the defendant for damages, as there was fraud and damage, the result of that fraud, not from an act remote and consequential, but one contemplated by the defendant at the time as one of its results. "We decide," observes the court, "that the defendant is responsible in this case for the consequences of his fraud whilst the gun was in the possession of a person to whom his representation was either directly or indirectly communicated, and for whose use he knew the gun was purchased" (f). And

(c) *Fletcher v. Bowsher*, 2 Stark. 565.
Baglehole v. Walters, 3 Campb. 154.

(d) *Pickering v. Dowson*, 4 Taunt. 784.

(e) *Taylor v. Buller*, 5 Exch. 779; 20 Law, J., Exch. 21.

(f) *Langridge v. Levy*, 2 M. & W. 532; 4 ib. 337. *Blakemore v. Brist. & Ex. Rail. Co.*, 8 Ell. & Bl. 1052; 27 Law, J., Q. B. 167.

where the defendant, in the course of a negotiation for the sale of a public-house, made a false and fraudulent representation to one Bourner as to the receipts of the house, and thereby induced Bourner to agree to buy it, and Bourner being unable to complete the purchase, got the plaintiff to take his contract off his hands by repeating to him the false representation made by the defendant, and the defendant then carried out the bargain with the plaintiff, and took the plaintiff's money, knowing that the false and fraudulent representation had been communicated to the plaintiff, and that he was acting under the influence of it, it was held that the plaintiff was entitled to sue the defendant for the deceit, although the false representation had not been made to him directly by the defendant, but through the medium of a third party. "The defendant," observes Bosanquet, J., "knowing that the fraudulent representation he had made to Bourner had been communicated to the plaintiff, with whom he was about to contract, and withholding an explanation or denial of Bourner's authority for the communication, and suffering the plaintiff on the faith of that communication to enter into the contract, was as much guilty of a deceit on the plaintiff as if he had in terms repeated the statement himself" (*g*).

In the case of fraudulent representations through the medium of trade marks, intended to pass off goods of inferior make as the superior goods of a celebrated manufacturer, either the manufacturer who is injured by having another man's goods palmed off upon the market as his goods (*h*), or the purchaser who has been deceived and defrauded may bring the action (*i*).

If the vendor of a lamp represents the lamp to be fit and proper to be used, knowing that it is not, and intending it to be used by the plaintiff's wife, or any particular individual, the wife, joining her husband for conformity, or that individual, will be entitled to an action for the deceit, upon the principle that if any one knowingly tells a falsehood with intent to induce another to do an act which results in his loss, he is liable to that person in an action for deceit (*k*).

Reports of joint-stock companies, though addressed to the shareholders, are generally meant for the information of all who are likely to have dealings with the company, and to influence the share-market, and operate upon the minds of sharebrokers and purchasers of shares; and where they are posted up in public places by direction of the board, or are to be bought by persons who desire information concerning the actual situation and condition of the company, they are deemed, as we have seen

(*g*) *Pilmore v. Hood*, 5 Bing. N. C. 109.

(*h*) 22 Eliz. cited by Dodderidge, J.,
Poph. 142.

(*i*) *Crawshay v. Thompson*, 4 M. & Gr.
386 n.

(*k*) *Longmeid v. Holliday*, 6 Exch. 766.

in point of law, to be addressed to all who peruse them, and are induced to buy shares by the statements contained in them (1). Representations made to the Stock Exchange Committee, to be publicly promulgated amongst the frequenters of the Stock Exchange, are deemed to be made to such frequenters of the Stock Exchange as have seen and acted upon the representations, and have been deceived and damnified thereby.

The plaintiff, in an action for deceit, alleged in his declaration that the defendant was the promoter of a gold mining company, and had issued shares, and published and circulated a prospectus for the purpose of inducing persons to purchase shares, representing the amount of capital, &c., and that at the time of the publication of this prospectus it was publicly known that the committee of the Stock Exchange in London would not appoint a settling-day for shares in any mining company, or permit the same to be inserted in the official list of the committee, until the subscription-list of the company was full, and not less than two-thirds of the scrip had been paid upon and were ready to be issued; and that the defendant, in order to procure the insertion of the shares of the company in the official list, and induce the committee to appoint a settling-day for the shares and induce persons to purchase shares in the belief that their insertion in the list had been properly procured, falsely and fraudulently represented to the committee that the subscription-list was full; that 40,711 shares had been paid upon, for all which scrip certificates had been issued, or were ready for delivery; that the produce of the 40,711 shares had been received by the defendant, and was in the hands of his bankers to his credit, and thereby induced the committee to insert the shares of the company in the official list, and appoint a settling-day for such shares; and that the plaintiff, having notice of the said prospectus, and having seen the shares quoted and inserted in the official list, and believing that they had been admitted and inserted therein by fair, honest, and proper means, and that the subscription-list of the company was full, and that not less than two-thirds of the scrip had been paid upon, and either had been issued, or were ready to be issued, was thereby induced to purchase shares in the company. The declaration then went on to allege the falsehood of the representations made to the committee of the Stock Exchange, the knowledge thereof by the defendant, the deception of the plaintiff, and the damage he had thereby sustained, and it was held that all persons who were induced to buy the shares of the company by seeing them quoted in the official list of the Stock Exchange, were within the scope of the false

(1) *Scott v. Dixon*, 20 Law, J., Exch. 62 n. *Bedford v. Bagshaw*, ib. 59.
Gerhard v. Bates, 2 Ell. & Bl. 476.

and fraudulent representation made by the defendant, and were entitled to maintain an action against him for damages (m).

By 20 & 21 Vict. c. 54, s. 8, it is enacted, that if any director, manager, or publick officer of any body corporate or publick company shall concur in making, circulating, or publishing any written statement or account, which he shall know to be false in any material particular, with intent to deceive or defraud any member, shareholder, or creditor of such body corporate or publick company, or with intent to induce any person to become a shareholder or partner therein, or to intrust or advance any money or property to such body corporate or publick company, or to enter into any security for the benefit thereof, he shall be guilty of a MISDEMEANOUR. This statute does not in any wise interfere with the civil remedy by way of action against any such director, manager, or publick officer, for damages for fraud and deceit; the rule requiring parties to proceed for the criminal offence before they pursue their civil remedy applying only, as we have seen, to *felonies* (ante, pp. 219, 220).

Parties to be made defendants — Principal and agent. — If a fraudulent act has been committed by an agent without the knowledge of the principal, and the latter afterwards adopts the act, and takes the benefit of the fraud, he will be responsible in damages to the party who has been deceived and injured by the fraudulent act (n), but if he repudiates the transaction as soon as he becomes acquainted with the fraud, and shuns all participation therein, he will not be responsible for the fraud if it was committed by the agent without his sanction and authority, and the representation was not within the scope of the ordinary authority of an agent acting in such a matter (o). Where a merchant employed a factor to sell silk for him, and the factor fraudulently sold one sort of silk for another, "and the doubt was whether this deceit could charge the merchant," Holt, C. J., was of opinion that the merchant was answerable for the deceit of his factor, "though not criminaliter yet civiliter; for, seeing somebody must be a loser by this deceit, it is more reason that he that employs the deceiver should be a loser than a stranger" (p). "The principal and his agent are for this purpose completely identified" (q). "The representation, if fraudulently made by the agent, will bind the principal equally as if made by the principal" (r).

A servant employed to sell a horse and receive the price, has an im-

(m) *Bedford v. Bagshaw*, 4 H. & N. 548; 29 Law, J., Exch. 59. *Bagshaw v. Seymour*, ib. 62, n.; 32 Law, T. R., H. L. 81.

(n) *Wright v. Crookes*, 1 Sc. N. R. 685.

(o) *Grant v. Norway*, 10 C. B. 688.

Cornfoot v. Fowke, 6 M. & W. 369.

(p) *Herrn v. Nichols*, 1 Salk. 289.

(q) *Ld. Denman, C. J., Fuller v. Wilson*, 3 Q. B. 67.

(r) *Tindal, C. J., ib. 1010. Taylor v. Green*, 8 C. & P. 319.

plied authority to warrant the horse (*s*), but not a servant who is merely employed to deliver the animal to a purchaser (*t*). If a broker who is authorized to advertise a ship for a voyage warrants by his advertisement that she shall sail with convoy, the shipowners are bound by the warranty, although in giving it the broker may have exceeded his authority (*u*). If an agent employed by the indorsees of a bill to get it discounted, and not restricted as to the mode of doing it, warrants the bill to be a good bill, his employers are bound by the warranty (*x*).

Fraudulent representations by joint-stock companies—*Parties to be made defendants*.—The shareholders of a joint-stock company cannot be made individually responsible in damages in an action for deceit, for adopting and authorizing the publication of a false and fraudulent report respecting the pecuniary state and condition of the company, unless it be proved that the report has been signed by them (*ante*, p. 635), and was false to their knowledge at the time they attached their signatures to it; but the company itself may be made responsible for fraud through the medium of acts done by the managers and shareholders in the management of its concerns. If, with a view to raise the marketable value of the shares of a tottering and insolvent company, a report, fraudulently misrepresenting the real state of the concern, the real amount of its assets, and of the demands upon it, is received and adopted by the shareholders at a general meeting, and promulgated and published to the world to induce strangers to come forward and invest capital in the concern, this must be taken as between the company and third persons, who receive and act upon the report to their detriment, to be a representation by the company: "otherwise companies of this sort would be in this extraordinary predicament, that they might employ, nay, must employ, agents to carry on their concerns, and those agents, with the authority of the company, might make representations, be they ever so false and ever so fraudulent, and yet, nevertheless, the company must benefit by those misrepresentations, without being at all liable to be told, That is your fraud" (*y*).

But the representation in these cases must be within the scope and authority of the party making it; for where a representation on behalf of a public company was made by the mere law agent or solicitor of the company, who was acting *ultra vires* when he made the representation, the company was held not to be bound by his act (*z*).

The directors and managers who sign and circulate reports wilfully

(*s*) *Alexander v. Gibson*, 2 Camp. 555.

(*t*) *Woodin v. Burford*, 2 Cr. & M. 392.

(*u*) *Rinquist v. Ditchell*, 2 Campb. 556 n.

(*x*) *Fenn v. Harrison*, 4 T. R. 177.

(*y*) *Glasgow Nat. Ex. Co. v. Drew*, 2 Macq. Sc. A. 124.

(*z*) *Burnes v. Pennel*, 2 H. L. C. 497, cited 2 Macq. Sc. A. 125.

misrepresenting the pecuniary condition of the company for the purpose of enhancing the value of the shares are, as we have seen, personally responsible in damages to all who have acted upon the faith of such reports, and have been deceived and injured by them (a):

Of declarations for deceit.—It is not necessary in a declaration for a deceitful representation to set out the representation in the precise words in which it was made. It is enough to state the substance and effect of it (b). This is the case with declarations for the assertion of a false claim of lien by the defendant upon the plaintiff's goods (c); a false assumption of authority to accept bills by procuration (d); a false assumption of title to goods (e); false representations by railway companies as to the time of the starting of their trains (f); by managing directors of joint-stock companies as to the amount of dividend guaranteed to the shareholders (g); by secretaries of insurance companies as to the management and financial condition of the company (h); false representations of authority to distrain (i); false representations that the patterns and designs of silk goods had been copied from registered patterns (k); false representations as to the character, credit, and circumstances of third parties (l); or of a firm or company of which the party making the representation is a member (m); false representations by agents of the sums due to them from their principals (n); false representations of the character, quality, or make of goods through the medium of counterfeit trade-marks and labels (o); false assumption of agency and of authority to order goods on behalf of a named principal.

Declarations for breach of warranty on the sale of a horse should set forth "that the defendant, by warranting a horse to be then sound and quiet to ride, sold the said horse to the plaintiff, yet the said horse was not then sound and quiet to ride" (p). A declaration which stated, that in consideration that the plaintiff, at the request of the defendant, had bought a horse of the defendant, the defendant promised that the horse was sound, was held bad in arrest of judgment, as setting forth a warranty after a sale, and not a sale founded upon and induced by a warranty (q).

(a) Ante, pp. 635, 636. *Stainbank v. Fernley*, 9 Sim. 556.

(b) *Gutsole v. Mathers*, 1 M. & W. 509.

(c) *Green v. Bulton*, 2 C. M. & R. 707.

(d) *Polhill v. Walter*, 3 B. & Ad. 114.

(e) *Dyster v. Battye*, 3 B. & Ald. 448.

(f) *Denton v. Gt. North. Rail. Co.*, 5 Ell. & Bl. 860; 25 Law, J., Q. B. 129.

(g) *Gerhard v. Bates*, 2 Ell. & Bl. 479.

(h) *Pontifex v. Bignold*, 8 Sc. N. R. 390.

(i) *Rawlings v. Bell*, 1 C. B. 951.

(k) *Barley v. Walford*, 9 Q. B. 199.

(l) *Corbett v. Brown*, 8 Bing. 33. *Tatton*

v. Wade, 18 C. B. 371. *Swann v. Phillips*, 8 Ad. & E. 457.

(m) *Devaux v. Steinkeller*, 8 Sc. 202.

(n) *Pewtriss v. Austen*, 6 Taunt. 522.

(o) *Morison v. Salmon*, 2 Sc. N. R. 449.

Crawshay v. Thompson, 4 M. & Gr. 357; 5 Sc. N. R. 562. *Rodgers v. Nowill*, 5

C. B. 109. *Blafeld v. Payne*, 4 B. & Ad. 410. *Sykes v. Sykes*, 3 B. & C. 541.

(p) 15 & 16 Vict. c. 76, Sched. B.

(q) *Roscorla v. Thomas*, 3 Q. B. 236.

Holt, C. J., Lysney v. Selby, 2 Ld. Raym. 1120.

Declaration against a party who has contracted as agent without authority.—Where a declaration stated that the defendant, having been employed to superintend the erection of a church, falsely and fraudulently represented that he was authorized by the Rev. Thomas Ireland to order, and did order, stone of the plaintiffs for the building of the said church, on account of the said Rev. Thomas Ireland and others, the committee for building, &c., and that the plaintiffs, relying on that representation, delivered the stone, and the same was used in the building of the church, and the defendant was not, as he well knew, authorized to order the stone, and the said Rev. Thomas Ireland having refused to pay for the stone, the plaintiffs, trusting in the said representation, sued the said Rev. Thomas Ireland for the price of the stone, who defended the action, and obtained a verdict on the ground that he had never authorized the defendant to order the stone, by reason whereof the plaintiffs lost the price of the stone, and had to pay a large sum of costs, it was held that the declaration disclosed a good cause of action (r).

Declaration by an agent against a principal for a false representation.—Where a declaration stated that the defendant, being possessed of certain cattle, represented to the plaintiff that he, the defendant, was entitled to sell the said cattle, and requested the plaintiff to put them up to auction, and the plaintiff, confiding in the representation, sold the cattle by auction, and, after deducting the expenses of the sale, paid over the purchase-money to the defendant, whereas the defendant was not entitled to sell the cattle, and afterwards the true owner brought an action against the plaintiff, and recovered 1100*l.* damages and 95*l.* costs, which the plaintiff was obliged to pay, together with 300*l.*, his own costs of defending the action, whereupon the plaintiff requested the defendant to pay him the amount of the said damages and costs, but the defendant refused, it was held that the declaration disclosed a good cause of action (s).

Declarations for fraudulently misrepresenting the financial condition of a joint-stock company.—A good cause of action is disclosed by a declaration setting forth that the defendant was a director of a certain specified joint-stock company, the shares of which were transferable, and that the defendant, intending to deceive the plaintiff, fraudulently represented to the plaintiff that the said company was then in a flourishing condition, and the profits realized by the said company during the half year ending, &c., would fairly allow of a dividend at the rate of 6*l.* per cent per annum, to be paid out of such profits to the shareholders of the said company, and that the plaintiff, relying upon the representation made by the defendant,

(r) *Randell v. Trimen*, 18 C. B. 786.

(s) *Adamson v. Jarvis*, 4 Bing. 69; 12 Moore, 241.

bought shares in the said company, and became liable to contribute to the losses of the said company; whereas the said company was not, at the time the said representation was so made by the defendant, in a flourishing condition, but was insolvent, and the profits realized by the said company during the said half year would not fairly allow of the said dividend, nor of any dividend, to be paid to the said shareholders, and that the said dividend had not been paid out of the profits of the said company, but out of capital, as the defendant well knew at the time he so falsely represented as aforesaid, &c., showing that the plaintiff lost the value of his shares, and was obliged to contribute to the losses of the company, and claiming damages (t).

Of the plea of not guilty.—Where an action was brought against the defendant for selling a certain lease and certain fixtures and goodwill, for a larger price than they were worth, by means of a false and fraudulent representation, it was held that the plea of not guilty put in issue the sale by means of the fraudulent representation, and that the plaintiff was bound to prove both the sale and the misrepresentation (u). And where the wrongful act complained of was, that the defendant represented himself to be the agent of the master of a vessel, and thereby induced the plaintiffs to enter into a charter-party with him, when in fact he was not such agent, and had no authority to charter the vessel, it was held that the plea of not guilty put in issue both the fact of the misrepresentation and the fact of the making of the charter-party, the two facts together constituting the cause of action (x). Where the scienter is the gist of the action, it is put in issue by the plea of not guilty (y).

Under the plea of not guilty, the defendant may show that the representation is within the statute 9 Geo. 4, c. 14, s. 6 (ante, p. 635), and that it was not made by writing signed by the defendant (z).

Of the plea of infancy.—The plea of infancy is a good defence to an action for fraudulent representation and deceit. Thus it has been held that an infant is not responsible for falsely affirming goods to be his own goods, and that he had a right to sell them, and thereby inducing the plaintiff to purchase them (a); nor for a false and fraudulent representation that he was of full age, whereby the plaintiff was induced to lend him a sum of money (b).

Proof of fraudulent misrepresentation and deceit.—"It is settled law,"

(t) *Scott v. Dixon*, 29 Law, J., Ex. 62 n.
Bedford v. Bagshaw, ante, p. 630. *Gerhard v. Bates*, 2 Ell. & Bl. 489.

(u) *Mummery v. Paul*, 1 C. B. 326.

(x) *Brink v. Wingard*, 2 C. & K. 657.

(y) *Thomas v. Morgan*, 2 C. M. & R. 498.

(z) *Turnley v. Macgregor*, 6 M. & Gr. 46.

(a) *Grove v. Nevill*, 1 Keb. 778.

(b) *Johnson v. Pye*, 1 Sid. 258. *Price v. Hewett*, 8 Exch. 140. *Liverpool, &c. v. Fairhurst*, 9 Exch. 420; 23 Law, J., Exch. 163.

observes Parke, B., "that, independently of duty, no action will lie for a misrepresentation, unless the party making it knows it to be untrue, and makes it with a fraudulent intention to induce another to act on the strength of it, and to alter his position to his damage (c). In order, therefore, to maintain an action for deceit arising from a false and fraudulent misrepresentation, it must be proved either that the defendant knew his statement to be untrue (ante, p. 632), or that he pretended to a knowledge which he must have known; that he did not possess at the time he made the representation (ante, p. 634), or that he stated a fact to be true for a fraudulent purpose (d), and that he made it with the intention that the plaintiff should, either directly or indirectly, come to the knowledge of it, and act upon it. If the deceit consists in the fraudulent concealment of matters which were known to the defendant, and ought to have been disclosed to the plaintiff, the circumstances creating the right of the plaintiff to the information, and imposing upon the defendant the duty of giving it, must be clearly proved (ante, pp. 651-653).

Proof of the representation having been made to the plaintiff.—Publick announcements and representations issued by the authority and under the direction of the directors or managers of publick companies, and intended by them for general circulation in share-markets, and amongst purchasers of shares, are deemed in contemplation of law, as we have seen, to be made to all who desire to have dealings with the company, and to become purchasers of shares. "The allegation in a declaration that the representation was made to the plaintiff is completely proved by showing that it was contained in a report or prospectus, published by the defendants, and sold or distributed by them for the purpose of influencing the sale of shares, and being perused by persons desirous of buying shares, and that the plaintiff perused it, and was induced by the statements and representations contained in it to buy shares (e).

Proof that the plaintiff relied upon the representation, and not upon his own examination and judgment.—"Cases frequently occur in which, upon entering into contracts, misrepresentations made by one party are not in any degree relied upon by the other party. If the party to whom the representations were made, himself resorted to the proper means of verification before he entered into the contract, it may appear that he relied upon the result of his own investigation and inquiry, and not upon the representations made by the other party; or if the means of investigation and verification be at hand, and the attention of the party receiving the representations be drawn to them, the circumstances of the case may be

(c) *Thom v. Bigland*, 8 Exch. 731.
Childers v. Wooller, 8 W. R. 321.

(d) *Taylor v. Ashton*, 11 M. & W. 415.

(e) *Scott v. Dixon*, 29 Law, J., Exch. 632 n.
Bedford v. Bagshaw, ib. 65; ante, p. 636.

such as to render it incumbent upon a court of justice to impute to him a knowledge of the result which, upon due inquiry, he ought to have obtained, and thus the notion of reliance upon the representations made to him may be excluded. Again, when we are endeavouring to ascertain what reliance was placed on representations, we must consider them with reference to the subject-matter and the relative knowledge of the parties. If the subject is capable of being accurately known, and one party is, or is supposed to be, possessed of accurate knowledge, and the other is entirely ignorant, and a contract is entered into after representations made by the party who knows, or is supposed to know, without any means of verification being resorted to by the other, it may well enough be presumed that the ignorant man relied on the statements made by him who was supposed to be better informed; but if the subject is in its nature uncertain, if all that is known about it is matter of inference from something else, and if the parties making and receiving representations on the subject have equal knowledge, and means of acquiring knowledge, and equal skill (*ante*, p. 640), it is not easy to presume that representations made by one would have much influence upon the other" (*f*).

Cases frequently occur in which it appears that a contract was entered into after erroneous representations made by one party, and yet without the other party having at all relied upon those erroneous representations (*g*).

In an action for damages for a false representation by the defendant that he was authorized to accept a bill of exchange in the name of a public company, and to bind the company by the acceptance, the plaintiff must prove that he has sustained some actual pecuniary damage from the false representation. The mere fact of the bill coming into the plaintiff's hands does not *per se* import damage, as the plaintiff may have received the bill without having given any consideration for it (*h*).

Proof of warranties.—Although a warranty made orally on the completion of a written contract cannot be introduced as part of the contract, if the contract is silent as to the fact of the warranty (*i*); yet, if it can be shown that the warranty or representation was false to the knowledge of the party making it, and therefore fraudulent, it may be given in evidence as a circumstance collateral to the contract, and may be made the foundation of an action for deceit (*k*): for wherever a written contract or under-

(*f*) *The Master of the Rolls, Clapham v. Shillito*, 7 Beav. 149.

(*g*) *Shrewsbury v. Blount*, 2 Sc. N. R. 504. *Holt, C. J., Lysney v. Selby*, 2 Ld. Raym. 1120.

(*h*) *Eastwood v. Bain*, 28 Law, J., Exch. 74; 7 W. R. 90.

(*i*) *Addison on Contracts*, 4th edn. pp. 130, 842.

(*k*) *Dobell v. Stevens*, 3 B. & C. 623. *Meyer v. Everth*, 4 Camp. 22. *Wright v. Crookes*, 1 Sc. N. R. 685. *Hutchinson v. Morley*, 7 Sc. 341. *Canham v. Barry*, 15 C. B. 597; 24 Law, J., C. P. 100.

taking has been procured through the medium of falsehood and fraud, the fact may be proved by oral testimony, notwithstanding the existence of a writing embodying the terms of the bargain, but making no mention of the false representation (l).

An unstamped written agreement may be given in evidence to prove fraud, if it is used merely for the purpose of showing that a person paying money has been imposed upon (m).

Proof of terms and conditions of warranty by proof of public notices stuck up in an auction-room or repository where the thing warranted was sold.—If in an auction-room, or at a repository established for the sale of horses, the rules or conditions of sale are painted up in legible characters in a conspicuous position, the purchaser will be deemed to have had notice of the regulations, and will be bound by them, unless the vendor has resorted to some misrepresentation or contrivance to prevent the purchaser from reading them. And if by these rules or conditions of the sale it is stipulated that a warranty of soundness shall remain in force for a given period only, unless in the meantime a certificate of unsoundness is procured from a veterinary surgeon, the purchaser must comply with the stipulation, or lose his remedy upon the warranty (n).

Proof of breach of warranty of a horse—What constitutes unsoundness.—“The rule as to unsoundness,” observes Parke, B., “is, that if at the time of the sale the horse has any disease, or has undergone any alteration of structure either from disease or accident, which actually does diminish the natural usefulness of the animal, so as to make him less capable of work of any description, or which in its ordinary progress, or from its ordinary effects, will diminish the natural usefulness of the animal, such horse is unsound. I think the word ‘sound’ means, that the animal is free from disease at the time he is warranted. If we once let in considerations of the slightheadedness of the disease and facility of cure, where are we to draw the line? A horse may have a cold, which may be cured in a day; or a fever, which may be cured in a week or month; and it would be difficult to say where to stop. Of course, if the disease be slight, the unsoundness is proportionally so, and so also ought to be the damages” (o). Convexity of the cornea, rendering a horse short-sighted and causing him to shy, is unsoundness (p). It is not enough for the plaintiff to give evidence inducing a suspicion that the horse was unsound at the time of the warranty. If he only throws the soundness into doubt he is not entitled to recover (q).

Proof of manifest defects not covered by the warranty.—If the defendant

(l) *Davis v. Symonds*, 1 Cox, 405.

(m) *Holmes v. Sizemith*, 7 Exch. 807.

(n) *Bywater v. Richardson*, 1 Ad. & E.
508. *Mesnard v. Aldridge*, 3 Esp. 271.

(o) *Kiddell v. Burnard*, 9 M. & W. 669.

(p) *Holyday v. Morgan*, 28 Law, J.,

Q. B. 9.

(q) *Eaves v. Dixon*, 2 Taunt. 343.

can prove that the defect complained of by the plaintiff was a manifest defect obvious to all observers, and that the plaintiff examined the horse, and knew of the defect at the time he bought the animal, the defect will be excluded from the warranty (ante, pp. 640, 641). If the horse was naturally ill-formed from turning out one of its fore-legs, so as to be incapable of doing much work without cutting the ankle with the shoe so as to produce lameness, this is not unsoundness, rendering the vendor liable in damages for a breach of warranty (r). The peculiar form of hock called "curby hock," which is a natural defect, is not an unsoundness if it has not occasioned lameness up to the time of the sale, although such horses are very liable to throw out a curb, and become lame (s). A natural malformation of the animal, constituting a patent defect visible to the eye of every observer, must be taken to be known to a purchaser who has examined the horse, and he will be deemed to have bargained for the warranty of soundness subject to the patent defect (ante, pp. 640, 652); but if the defect is not obvious, it must be proved that the purchaser was cognizant of it at the time he purchased, for the very fact of the warranty having been given would tend to throw him off his guard, and prevent him from making a close examination of the animal (t).

Proof of vice.—If a horse has been warranted free from vice, and the horse is proved to be a crib-biter, the warranty is broken. "The habit of crib-biting," observes Parke, B., "may not indeed show vice in the temper of the animal but as it is a habit decidedly injurious to its health, and tending to impair its usefulness, it comes within the meaning of the term vice" (u).

Proof of the use of counterfeit trade marks.—In actions for damages for the fraudulent use by the defendant of the plaintiff's trade mark, it is necessary to prove that the plaintiff, being a manufacturer, has been accustomed to use a certain mark to denote that the goods so marked were of his manufacture; that such mark was well known and understood in the particular trade, and that the defendant had adopted the mark, and sold goods bearing such mark upon them, as and for the plaintiff's goods, with intent to deceive (x). It must be proved that the mark closely resembled the plaintiff's mark, and that it was used by the defendant to enable him to pass off his own goods as being of the plaintiff's make (y).

Remedies in equity for a false representation.—Where a false representation is made by one man to induce another to enter into a contract, and

(r) Alderson, J., *Dickinson v. Follett*, 1 Mood. & Rob. 300.

(s) *Brown v. Elkington*, 8 M. & W. 132.

(t) *Holyday v. Morgan*, 28 Law, J., Q. B. 9.

(u) *Scholefield v. Robb*, 2 Mood. & Rob.

210.

(x) Wilde, C. J., *Rodgers v. Nowill*, 5 C. B. 125.

(y) *Crawshay v. Thompson*, 4 M. & Gr. 387; 5 Sc. N. R. 562. *Morison v. Salmon*, 2 Sc. N. R. 452.

the party making the representation is no party to the contract, the Court of Chancery will compel the latter to make good his assertion as far as possible. The principle of equity, that where a party by misrepresentation draws another into a contract, such party shall be compelled, if possible, to make good the representation, applies not merely to cases where the statements were known to be false by those who made them, but to cases where statements, false in fact, were made by persons who believed them to be true, if in the due discharge of their duty they ought to have known, or if they had formerly known, and ought to have remembered, the fact which negatives the representation (z).

Of the damages recoverable in actions for fraudulent misrepresentation and deceit.—Damages are, as we have seen, recoverable from every defendant who has knowingly made a false statement to the plaintiff, with an intention that he should act upon it in reliance upon its truth, and the plaintiff has acted upon it, and been damnified; for “wherever a man wickedly asserts that which he knows to be false, and thereby draws his neighbour into a heavy loss, he is responsible for it, or for so much of the loss as was the necessary, natural, or probable and known consequences of the misrepresentation” (a). Damages also are recoverable, as we have seen, from persons who represent that to be true within their own knowledge which they do not know to be true, and so induce others to act upon the faith of the representation, and sustain damage (ante, pp. 634, 639), more particularly in those cases where the means of knowing the truth of the matter rests peculiarly or exclusively with the parties making the representation (ante, pp. 638–640). If a man assumes to be an agent when he is not so, he must answer for any damage which is the natural and direct result of confidence being given to the representation of authority. If he believed that he had authority to contract as agent when he had not, he is answerable for the consequences in an action of contract. If he knew that he had no authority, he is then responsible in an action for deceit (b). All special damages, which are the natural result of fraudulent misrepresentation and deceit, are recoverable from the defendant, if the plaintiff has claimed them in his declaration (post, p. 670).

Damages for breach of warranty.—If a vendor sells property absolutely as owner, and warrants his title and right of possession to the purchaser, and the purchase-money is paid, and after that the warranty is broken and the purchaser evicted and deprived of the possession and enjoyment of the thing sold, the measure of damages is the highest marketable value of

(z) *Pulford v. Richards*, 17 Beav. 94.

(a) *Pasley v. Freeman*, 3 T. R. 65; ante, pp. 631–651.

(b) *Collen v. Wright*, 7 Ell. & Bl. 314.

Randell v. Trimen, 18 C. B. 786; 25 Law, J., C. P. 307. *Simons v. Patchett*, 7 Ell. & Bl. 568; 26 Law, J., Q. B. 195.

the article between the time of eviction and the day of trial. If any special damage has been sustained by the purchaser, the amount thereof may be recovered in a special action upon the warranty. If the purchaser brings his action against the vendor for a breach of warranty of the quality or soundness of the thing sold, expressly or impliedly made at the time the contract of sale was entered into, and the goods have been returned by the purchaser to the vendor, the measure of damages is the marketable value which the goods would have possessed in the hands of the purchaser at the time of the delivery, if they had corresponded with the warranty given. If they have not been returned to the vendor by the purchaser, the measure of damages is then the difference between their marketable value to the purchaser in their defective state at the time of delivery, and the value they would have possessed had they answered the warranty; and if they have been resold by the purchaser without delay, and before any considerable fluctuations in the market have taken place, the difference between the price realized on the resale, after deducting the costs and expenses of the resale, and the price they would have fetched if they had answered the warranty.

Where goods had been purchased with a warranty in England, to be exported and resold in China, and the goods, on their arrival at Canton, were found not to answer the warranty, the measure of damages was held to be, not the difference between the agreed price and the price realized on the resale in China, but between the last-named price and what they would have sold for in the Chinese market, had they corresponded with the warranty (c). And where a horse-dealer purchased horses in Wales with a warranty of soundness, with a view of reselling them at a profit in the London market, and the horses on their arrival in London were found to be unsound, the fair measure of damages was held to be the difference between their marketable value in London as unsound horses, and what would have been their marketable value if they had been sound, and had corresponded with the warranty: and that if any of them had been resold in London with a warranty before the unsoundness was discovered, the price realized on such resale would be evidence of their marketable value in a sound condition corresponding with the warranty; and if they were subsequently returned and sold a third time as unsound horses without a warranty, the price realized on such third sale would be evidence of their actual marketable value in an unsound state, and the difference between the price realized on the two sales would be the measure of the damages fairly recoverable from the original vendor as resulting from his breach of warranty. If the purchaser estimates his damages according to the last-

(c) *Bridge v. Wain*, 1 Stark. 504. *Chesterman v. Lamb*, 2 Ad. & E. 129.

named standard, he would not of course be entitled to recover the costs, charges, and expenses, of bringing the animals up from Wales; but if he recover only the difference between the price paid in Wales and the actual value of the horses in their unsound condition, he would be entitled to recover the costs and expenses of bringing them up to market. The expenses of obtaining a certificate of unsoundness from the Veterinary College cannot be recovered from the vendor, nor any legal expenses which were not the necessary result of the defendant's breach of contract (*d*).

In an action for breach of warranty on the sale of a horse, where the plaintiff had brought the horse up from the country to London, and sold it at a profit, Lord Denman said: "I am of opinion that the amount of damages is what the horse would be worth if sound, deducting the price it sold for, after the discovery of the unsoundness; and I think the price at which it sold to the plaintiff is not conclusive as to its value, though I think it very strong evidence" (*e*). According to the old doctrine, it was the duty of the purchaser, upon the refusal of the seller to take back the horse, to sell the animal immediately, but it is now held that the purchaser is entitled to keep the horse for a reasonable time for the purpose of re-selling the animal to the best advantage, and may recover the expense of the keep of the horse in the interval as part of the damages (*f*); but in order to entitle him to recover the expense of the keep, he must prove that he tendered back the horse to the vendor as soon as he discovered the unsoundness and breach of warranty, and that the vendor refused to take the horse back (*g*).

Special damages — Breach of warranty. — If special damages have been sustained by reason of the misrepresentation and deceit, or breach of warranty of a vendor, they may be recovered from the latter, if the plaintiff has claimed them in his declaration. Where a cable was warranted sound, and a purchaser, relying on the warranty, attached an anchor to the cable, and the cable was unsound, and broke, and the purchaser lost his anchor, it was held that the value of the anchor might be recovered in addition to the price paid for the cable, but that the plaintiff must expressly claim it in his declaration of his cause of action (*h*).

If a plaintiff, who has bought goods of the defendant on the faith of a warranty, has resold them with a warranty, and the goods do not answer the warranty, the plaintiff is entitled to recover from the defendant the damages sustained by such sub-purchaser, as they are the natural and pro-

(*d*) *Olare v. Maynard*, 7 C. & P. 741; 6 Ad. & E. 523.

(*e*) *Olare v. Maynard*, 7 C. & P. 743.

(*f*) *M'Kenzie v. Hancock*, R. & M. 436. *Ellis v. Chinnock*, 7 C. & P. 169. *Chester-*

man v. Lamb, 2 Ad. & E. 129.

(*g*) *Caswell v. Coars*, 1 Taunt. 566.

(*h*) *Borradaile v. Brunton*, 2 Moore, 582; 8 Taunt. 535.

bable consequence of the defendant's breach of contract (i). But the damages must be such as may fairly and reasonably be considered in the ordinary course of things to be the probable result of the plaintiff's acting on the faith of the representation or warranty. If there are special circumstances rendering the misrepresentation or deceit peculiarly injurious to the plaintiff, the defendant will not in general be responsible for the increased damages resulting therefrom, unless the special circumstances were known to him at the time of the making of the representation (k).

Where the plaintiff, having bought of the defendant a horse warranted sound, resold the horse with a like warranty, and was sued for a breach thereof by the second purchaser, and the plaintiff then gave the defendant notice of the action and offered him the option of defending it, but the defendant gave no answer, and the plaintiff failed in the action and had to pay damages and 88*l.* costs, it was held that he was entitled to recover these costs in addition to the damages he had been compelled to pay to his immediate purchaser (l). So where the defendant sold the plaintiff a picture warranted to be painted by Claude, and the plaintiff afterwards resold the picture with a like warranty, and the picture turned out not to be a Claude, and the second purchaser sued the plaintiff for the breach of warranty, and recovered a certain sum for damages and costs, and the plaintiff then sued the defendant, it was held that he was entitled to recover the amount of the damages and costs paid to the second purchaser, and also his own costs incurred in defending the action brought by the latter (m). But if the plaintiff has made a rash and improvident defence; if he has had an opportunity of testing the thing purchased, and might have ascertained by examination whether it did or did not correspond with the warranty, and has neglected so to do, and runs his chance of an action, he will not be permitted to recover the costs of his defence (n). If the costs have been taxed, the taxed costs only can be recovered, and not extra costs which have been disallowed on taxation, or costs as between attorney and client (o).

Special damage—Legal liability to third parties.—Where a legal liability to pay money has been thrown upon the plaintiff by reason of a breach of warranty on the part of the defendant, and a claim is made in respect thereof on the plaintiff, the latter can recover the amount he is so

(i) *Randall v. Raper*, 1 Ell. Bl. & Ell. 88; 27 Law, J., Q. B. 266.

(k) *Hadley v. Baxendale*, 9 Exch. 341; 23 Law, J., Exch. 179. *Portman v. Middleton*, 4 C. B., N. S., 322; post, ch. 21, s. 1.

(l) *Lewis v. Peake*, 7 Taunt. 158.

(m) *Pennell v. Woodburn*, 7 C. & P. 118.

(n) *Wrightup v. Chamberlain*, 7 Sc. 598.

(o) *Grace v. Morgan*, 2 Sc. 793.

liable to pay from the defendant, if he claims it in his declaration. Thus, where the plaintiffs bought of the defendant a quantity of barley warranted by them to be chevalier seed barley, and in the course of their trade resold it with a like warranty to sub-purchasers, who sowed it on their land, and the seed turned out not to be chevalier seed barley, and produced a very inferior crop, and the sub-purchasers then came upon the plaintiff for compensation, and the plaintiff sued the defendants on their warranty, it was held that the plaintiff was entitled to recover the amount of damages which the sub-purchasers had suffered, though he had paid them nothing. "The natural amount of damages," observes Erle, J., "would be the difference between the value of the inferior crop and of that which would have come up if chevalier seed barley had been sown. Then it is said that the sub-purchasers have merely claimed the money from the plaintiffs, but have not brought any action, and non constat that the claim may even be enforced. But where a legal liability to pay is incurred by a man under such circumstances as these, and a claim is made upon him in respect of it, he can recover the amount he is so liable to pay from the person by whose breach of contract he has incurred the liability (p).

False assumption of agency—Special damages.—A person who induces others to contract with him as the agent of a third party, by an unqualified assertion of his being authorized to act as such agent, is answerable to the person who so contracts for any damages he sustains by means of the assertion of the authority being untrue, whether he was or was not aware of his want of authority at the time he made the assertion. Where the defendant, a land agent, professed that he had, and supposed that he had, authority from a landlord to let an estate, and thereupon entered into an agreement in writing with the plaintiff, whereby he professed to bind the landlord to grant the plaintiff a lease of the estate for twelve years, and the plaintiff, supposing that the defendant had the authority he pretended to have, entered upon the land, and bought and paid for the straw and muck, and expended considerable sums in preparing the land for cultivation, and the landlord then refused to grant the lease on the ground that the defendant was not authorized to let the land on the terms of the agreement, and the plaintiff, relying on the representation of authority that had been made by the defendant, instituted a suit in the Court of
 *Chancery to enforce a specific performance of the agreement, and gave notice to the defendant of the institution of the suit, and that the landlord defended on the ground that the defendant had no authority to sign the agreement on his behalf, and that if the suit failed from want of

authority the plaintiff would look to the defendant for costs, and the defendant did not withdraw his assertion of authority, but said he would resist any demand the plaintiff might have against him, and the suit went on, and it was established that the defendant had no authority to let the land on the terms specified, and the plaintiff had to pay the costs of the suit, it was held that he was entitled to recover these costs from the defendant, as well as the expenses he had incurred in preparing the land for cultivation (q).

(q) *Collen v. Wright*, 8 Ell. & Bl. 647 ; 20 Law, J., Q. B. 147 ; 27 ib. Exch. 217.

CHAPTER XVIII.

OF MATRIMONIAL AND PARENTAL INJURIES, ADULTERY, AND SEDUCTION.

SECTION I.—*Of infringements of matrimonial and parental rights.*—Desertion of wives by their husbands—Restitution of conjugal rights—Judicial separation—Cruelty and desertion—Condonation thereof—Revival of condoned cruelty by threats—What amounts to desertion without cause—Adultery and dissolution of the marriage contract—Condonation of adultery—Power of the Divorce Court over marriage settlements—Orders respecting the custody of children—Right of fathers and guardians to the custody of infant children—Control over this right exercised by the courts—Custody of children of British subjects born abroad—Custody of children of foreigners—Right of mothers to the custody of children under seven years of age—General right of access of mothers to their children—Obligation of parents to provide for children—Proceedings before the Divorce

Court—Evidence on the hearing of petitions—Competency of the husband and wife to give evidence—Evidence of co-respondents—Mode of taking evidence—Appeal—Trial of questions of fact before a jury—Petitions for damages from adulterers—Pleadings thereon—Evidence—Proof of marriage—Damages recoverable—Application thereof.

SECTION II.—*Of seduction.*—Harbouring of married women—Seduction and loss of service of servants, daughters, and wards—Pretended hiring of girls for purposes of seduction—Seduction of married daughters—Effect of proof that the defendant, though he seduced the girl, was not the father of her child—Effect of proof of the seduction having been occasioned by the plaintiff's neglect of his parental duties—Parties to actions for seduction—Pleadings, defences, and evidence—Damages recoverable.

SECTION I.

OF THE INFRINGEMENT OF MATRIMONIAL AND PARENTAL RIGHTS.

Of the desertion of married women by their husbands.—A wife deserted by her husband may at any time after such desertion, if resident within the metropolitan district, apply to a police magistrate, or if resident in the country, to justices in petty sessions, or in either case to the Divorce Court, or the judge ordinary thereof, for an order to protect any money

or property she may acquire by her own lawful industry, and property which she may become possessed of, after such desertion, against her husband, or his creditors, or any person claiming under him; and such magistrate, or justices, or court, if satisfied of the fact of the desertion, and that the same was without reasonable cause, and that the wife is maintaining herself by her own industry or property, may make and give to the wife an order protecting her earnings and property acquired since the commencement of the desertion from her husband, and all creditors and persons claiming under him; and such earnings and property will belong to the wife as if she were a feme sole: but every such order, if made by a police-magistrate or justices at petty sessions, must, within ten days after the making thereof, be entered with the registrar of the County Court within whose jurisdiction the wife is resident; and the husband, and any creditor or other person claiming under him, may apply to the court, or to the magistrate, or justices by whom such order was made, for the discharge thereof. If the husband, or any creditor of, or person claiming under the husband, shall seize, or continue to hold, any property of the wife after notice of any such order, he may be compelled, at the suit of the wife, to restore the specific property, and also a sum equal to double the value of the property so seized or held after such notice as aforesaid. If any such order of protection be made, the wife, during the continuance thereof, is, and is deemed to have been during such desertion of her, in the like position in all respects with regard to property and contracts, and suing and being sued, as if she had obtained a decree of judicial separation. These provisions extend to property to which the wife becomes entitled as executrix, administratrix, or trustee (*r*).

The affidavit in support of an application to the Divorce Court for an order under this section of the statute, should state circumstances sufficient to satisfy the court of the fact of the desertion. It should set out the time of the husband's going away, and state whether the wife has had any subsequent communication with him, and if so, the nature of that communication, whether she knows where he is or what he is doing, and whether she has received any money from him, or any promise to contribute to her support, or to return to her (*s*).

What amounts to desertion.—Desertion, under s. 21 of the Divorce Act, means not only that the husband has absented himself from his wife, but has left her unprovided for; and such desertion must continue at the time of making the order, so that a *bond fide* offer on the part of the husband

(*r*) 20 & 21 Vict. c. 85, s. 21; 21 & 22 Vict. c. 108, ss. 6, 7.

(*s*) *Ex-parte Sewell*, 28 Law, J., Prob. & Matr. 6.

to return and provide for his wife would take away her right to have the order made (t).

A married woman, whose earnings and property have been protected against her husband and his creditors by an order made under s. 21, on account of his desertion of her, may obtain an order from the Court of Chancery for the payment of a legacy given to her in general terms (u).

Of the restitution of conjugal rights.—By 20 & 21 Vict. c. 85, s. 17, it is enacted, that applications for the restitution of conjugal rights may be made either to the court for divorce and matrimonial causes, or to any judge of assize at the assizes, held for the county in which the husband and wife reside, or last resided together, who may decree restitution of conjugal rights, or may refer the application to any of her Majesty's counsel or serjeants-at-law named in the commission of assize or nisi prius, who is then clothed with all the powers of the judge for deciding upon the matter of the petition. The judge of assize, or person nominated by him, is entitled (s. 18) to avail himself of all officers, and use and exercise all powers and authorities ordinarily used and exercised by courts of assize for the determination of causes and other matters usually heard and decided by them; and every order made by any judge of assize or other person under the authority of the act may, on the application of the person obtaining the same, be entered and enforced as an order of the court.

The court may compel the man and wife to live under the same roof, but it cannot constrain them to have intercourse with each other, nor to live together on terms of conjugal affection (x).

The doctrine of the canon law, that where husband and wife have both been guilty of adultery, there is *compensatio criminum*, and both are restored to the position of innocent parties, forms no part of the law of England. A suit, therefore, for the restitution of conjugal rights cannot be sustained by a wife who has committed adultery, although the husband also has committed adultery (y).

Of judicial separation of husband and wife on the ground of adultery, cruelty, or desertion.—By the statute 20 & 21 Vict. c. 85, s. 7, divorce a mensâ et thoro is abolished, and in lieu thereof the court for divorce and matrimonial causes is authorized to pronounce a sentence of judicial separation between husband and wife, which may be obtained (s. 16) either by the husband or the wife on the ground of adultery, or cruelty, or desertion

(t) *Cargill v. Cargill*, 27 ib. 70.

(u) *Re Kingsley*, 28 Law, J., Ch. 80.

(x) *Shelford's Marriage and Divorce*.

Rogers's Eccles. Law.

(y) *Hope v. Hope*, 27 Law, J., Prob. & Matr. 43.

without cause for two years and upwards (*z*). The application may be made either to the court for divorce and matrimonial causes, or to any judge of assize, at the assizes held for the county in which the husband and wife reside, or last resided together, who may pronounce a decree for a judicial separation, or may refer the application to any of her Majesty's counsel or serjeants-at-law, as in the case of an application for restitution of conjugal rights (*ante*, p. 674), and relief is to be given (*s. 22*) on principles and rules as nearly as may be conformable to the principles and rules on which the ecclesiastical courts have heretofore acted and given relief.

What degree of cruelty has been deemed sufficient to warrant a decree for a judicial separation.—If a husband refuses his wife the common necessities of life, or treats her with gross insult and indignity; if he spits in her face, attempts to debauch her maid-servants (*a*), or puts her unnecessarily into confinement, or under personal restraint; or strikes her, or threatens her with personal violence unjustifiably and without adequate provocation (*b*), and conducts himself so as to give her a reasonable apprehension of bodily harm if she continues to reside with him, he is guilty of cruelty, and entitles her to separation of bed and board (*c*). "Everything," observes Sir William Scott, "is, in legal construction, cruelty, which tends to bodily harm, and in that manner renders cohabitation unsafe. Whenever there is a tendency only to bodily mischief, it is a peril from which the wife is to be protected. It is not necessary to inquire from what motive the treatment proceeds. Nor is it necessary that the conduct of the wife should be entirely without blame, for the imputation of blame to the wife will not justify the ferocity of the husband." Constant insult, constant vituperation, and charges of gross offences, made in the presence of the wife and before her friends, servants, or strangers, and such injurious treatment as renders life unbearable, constitute good grounds for a separation, but mere turbulence of temper and petulance of manners are not sufficient." The assistance of the court, moreover, will not be afforded to a wife "who has taken upon herself to avenge her own wrongs, and to maintain a contest of retaliation" (*d*). Where it appeared that a married couple had for thirty years been continually quarrelling, and the wife petitioned for a judicial separation, the judge held that he had no power to separate them on that account; for married persons cannot be legally separated upon the disinclination of one or both of them to cohabit together leading

(*z*) *Brookes v. Brookes*, 28 Law, J., Prob. & Matr. 38.

(*a*) Hag. Eccles. 776; Hetley, 149. *Saunders v. Saunders*, 1 Rob. Ec. R. 549.

(*b*) *Waring v. Waring*, 2 Phill. 132.

(*c*) *Gregory's case*, 4 Burr. 1991.

(*d*) Hag. Consist. 458; 119, 364. *Paterson v. Paterson*, 3 H. L. C. 328. *Curtis v. Curtis*, 27 Law, J., Prob. & Matr. 75.

to perpetual quarrels (e). "If a woman gets drunk, and loses her self-possession and uses violence, or attempts to destroy the property or stock in trade of her husband, he may employ as much violence as is necessary to protect his property or himself; but he goes too far if he follows her away, and strikes her after she has ceased her violence. The law gives a man no authority to beat a drunken wife" (f). Where a husband sought to get rid of a drunken and passionate wife, who destroyed his furniture, the judge said, "I must be cautious about opening the court to cases of this description. The wife may have an unruly propensity in her drunken fits to destroy property, but there is no evidence of such *sævitia* as would justify me in decreeing a judicial separation" (g).

Revival of condoned cruelty by threats.—Where there have been acts of violence followed by condonation, threats subsequently uttered of such a nature, and so expressed, as to satisfy the court that further cohabitation would be attended with danger to the party threatened, constitute a sufficient ground for a decree for a judicial separation (h).

What amounts to desertion without cause.—A husband who absents himself from his wife for the *bonâ fide* purpose of obtaining employment, and continues absent with the concurrence of the wife, or without any communication to him of her disapproval of his absence, or any manifestation of a desire on her part for his return to her, cannot be said to have deserted her within the meaning of s. 16 of the Divorce Act. "I think it clear," observes the Judge Ordinary, "that to constitute desertion without cause by the husband, it must be shown that he has wilfully absented himself without cause from the society of his wife, and in spite of her wish, she not being a consenting party" (i). Desertion under this section means that the husband has absented himself, and has left his wife unprovided for; and such desertion must have continued for two years at the time of the making of the petition for a judicial separation, so that a *bonâ fide* offer of the husband to return and provide for his wife and take her home, he having a home prepared for her, would take away her right to a judicial separation (k). But a mere vague intimation by the husband to the wife that she may rejoin him, not containing any definite offer of a home, will not deprive her of this right when once acquired (l).

Alimony in cases of judicial separation.—The Divorce Court, after making a decree for a judicial separation, may also make a decree or

(e) *Bostock v. Bostock*, 27 ib. 87.

(f) *Pearman v. Pearman*, 20 Law, J., Prob. & Matr. 54.

(g) *Scott v. Scott*, 29 Law, J., Prob. & Matr. 64.

(h) *Bostock v. Bostock*, 27 Law, J.,

Prob. & Matr. 88.

(i) *Thompson v. Thompson*, 27 ib. 68.

(k) *Cargill v. Cargill*, 27 Law, J., Prob. & Matr. 69.

(l) *Oudlipp v. Oudlipp*, ib. 64.

order for alimony, and may (s. 24) direct the same to be paid either to the wife herself, or to any trustee on her behalf, to be approved by the court, and may impose any terms or restrictions which to the court may seem expedient.

Of adultery and the dissolution of the marriage contract.—Adultery was formerly an indictable, and for about ten years was *de facto* a capital offence, being made so by a statute passed by the Rump Parliament, A.D. 1650 (m), after Charles the First had been beheaded, and the House of Lords voted useless and dangerous. This statute became a nullity at the Restoration, and adultery has since been held to be a mere civil injury and ground for divorce. The Divorce Act, 20 & 21 Vict. c. 85, s. 27, enacts, that a husband may petition the court for the dissolution of the marriage on the ground of adultery on the part of his wife, and the wife may petition for the dissolution of the marriage on the ground that her husband has been guilty of incestuous adultery, or of bigamy with adultery (n), or of rape, sodomy, or bestiality, or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce *a mensâ et thoro* (o), or of adultery coupled with desertion, without reasonable excuse, for two years or upwards. But if it appears to the court that the petitioner has been in any manner accessory to, or conniving at the adultery (p), or has condoned it (s. 29), or that the petition is presented or prosecuted in collusion with either of the respondents, the petition will (s. 30) be dismissed. And if in the opinion of the court the petitioner has been guilty of unreasonable delay in presenting or prosecuting the petition, or of cruelty towards the other party to the marriage, or of having deserted or wilfully separated from the other party to the marriage before the adultery complained of, and without reasonable excuse (q), or of such wilful neglect or misconduct as has conduced to the adultery (r), it is competent to the court (s. 31) to refuse to dissolve the marriage. A wife is not deprived of her right under s. 27 to a divorce on the ground of adultery coupled with desertion, for two years and upwards, by a subsequent offer on the part of the husband to return and cohabit with her (s).

Wilful neglect or misconduct on the part of the husband conducing to the adultery.—The policy of the legislature seems to have been to deprive the

(m) 2 Scobell's Acts, part 2, p. 121.

(n) *Horne v. Horne*, 27 Law, J., Prob. & Matr. 50.

(o) Ante, p. 675. *Ward v. Ward*, 27 ib. 68.

(p) *Walton v. Walton*, 28 Law, J., Prob. & Matr. 97. *Studdy v. Studdy*, ib. 105.

(q) *Coulthart v. Coulthart*, 28 Law, J., Prob. & Matr. 21.

(r) *Du Terraux v. Du Terraux*, 28 Law, J., Prob. & Matr. 95. *Cunnington v. Cunningham*, 28 Law, J., Prob. & Matr. 101. *Groves v. Groves*, ib. 108.

(s) *Cargill v. Cargill*, 27 Law, J., Prob. & Matr. 60.

husband of a remedy by divorce if he has misconducted himself as a husband, and has contributed to his own dishonour, not to punish neglect or misconduct unconnected with the relation of husband and wife. The neglect or misconduct of the husband, therefore, which disentitles him to a divorce, must be in his marital capacity, and a breach of some marital duty. If, therefore, the husband is convicted of felony and transported, and the wife being deprived of the protection of her husband then lives in adulterous intercourse with another man, the conviction and transportation of the husband do not constitute misconduct in the husband disentitling him to a divorce (t).

Condonation of adultery is forgiveness of the conjugal offence, with full knowledge of all the circumstances. "Judges of great eminence have said, that there is a great difference between what would constitute condonation of the adultery of the husband and what that of the wife; that conduct which would be considered culpable in a husband would be praiseworthy in a wife; that forgiveness on the part of the wife, in the hope of reclaiming her husband, would be meritorious, while a similar forgiveness by the husband would be dishonourable. Passages to this effect abound in the judgments of Lord Stowell and Sir J. Nicholl" (u). The forgiveness of a wife, which is to take away the husband's right to a divorce, must not fall short of reconciliation, and this must be shown by the reinstatement of the wife in her former position, so that subsequent conjugal cohabitation must be proved. Mere words of condonation, however strong, can only be regarded as imperfect forgiveness, and unless followed up by reconciliation and the reinstatement of the wife in the position she occupied before she transgressed, are incomplete, and do not amount to legal condonation. There is no legal condonation where the act of forgiveness has not been accompanied or followed by conjugal cohabitation (x).

The fact of the adultery of one of the parties having been condoned is no bar to a petition for a divorce on account of adultery afterwards committed by the other (y). The adultery of the wife, therefore, if it has been condoned by the husband, is no bar to a suit by her for a judicial separation on the ground of adultery subsequently committed by him (z).

Alimony in cases of dissolution of marriage.—After a decree for a dissolution of marriage, the court may order the husband to secure such a sum

(t) *Cunnington v. Cunningham*, 28 Law, J., Prob. & Matr. 101.

(u) The Judge Ordinary, *Peacock v. Peacock*, 27 Law, J., Prob. & Matr. 71.

(x) *Keats v. Keats*, 28 Law, J., Prob. &

Matr. 78.

(y) *Anichini v. Anichini*, 2 Curt. 210.

(z) *Seller v. Seller*, 28 Law, Prob. & Matr. 90.

of money for the support of the wife as it may deem reasonable, having regard (s. 32) to the wife's fortune, the ability of the husband, and the conduct of the parties (a).

Power of the Divorce Court over marriage-settlements and the custody of the children of the marriage.—By 22 & 23 Vict. c. 61, s. 5, it is enacted, that the court for divorce, &c., after a final decree of nullity of marriage, or dissolution of marriage, may inquire into the existence of ante-nuptial or post-nuptial settlements, made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole, or a portion of the property settled, either for the benefit of the children of the marriage, or of their respective parents, as to the court shall seem fit.

Orders respecting the custody of children.—In any suit or proceeding for obtaining a judicial separation, or a decree of nullity of marriage, and on any petition for dissolving a marriage, the court may (s. 35) from time to time, before making its final decree, make such interim orders, and may make such provision in the final decree, as it may deem just and proper with respect to the custody, maintenance, and education of the children, the marriage of whose parents is the subject of such suit or other proceeding, and may, if it shall think fit, direct proper proceedings to be taken for placing such children under the protection of the Court of Chancery. The power of the court under this section of the statute is not a general power of dealing with the custody of children; it exists only where there is a suit for obtaining a judicial separation, a decree of nullity, or of dissolution of marriage. And the words, "just and proper," are to be construed with reference to the circumstances affecting the suit, and not merely with reference to the rules by which courts of equity and of common law have been governed in questions respecting the custody of infants (b). But by 22 & 23 Vict. s. 4, it is enacted, that after a final decree of judicial separation, nullity of marriage, or dissolution of marriage, the court may, upon application (by petition) for this purpose, make, from time to time, all such orders and provisions with respect to the custody, maintenance, and education of the children, the marriage of whose parents was the subject of the decree, or for placing such children under the protection of the Court of Chancery, as might have been made by such final decree, or by interim orders, in case the proceedings for obtaining such decree were still pending; and all orders under this enactment may be made by the Judge Ordinary alone, or with one or more of the other judges of the court.

(a) *Robotham v. Robotham*, 27 Law, J., Prob. & Matr. 61.

(b) *Marsh v. Marsh*, 28 ib. 16; 7 W. R. 129.

Power of the judge of assize, or person nominated by him, to make provision respecting the custody and education of children.—When an application for a judicial separation has been made to a judge of assize at the assizes for the county in which the husband and wife reside, or last resided together, the judge of assize, or the queen's counsel or serjeant nominated by him pursuant to the statute (ante, p. 675), has the same power as the court to make provision touching the custody, maintenance, and education of the children of the marriage (c).

Of the common-law right of fathers to the custody of their infant children.—Every father has a right by the common law to the exclusive custody of his legitimate infant children, although they be within the age of nurture; and if he has been deprived of this custody, it will be restored to him both by the courts of common law and the Court of Chancery (post, s. 2), so long as he has not by immorality and misconduct disqualified himself from being the legal guardian of his children, and forfeited his claim to the assistance of the court. A contract by the father for the abandonment of these rights, and for the maintenance and education of the child by a relation, or any other person, does not prevent him from claiming the custody of the child, and requiring the child to be delivered up to him (d). But when a parent has committed the care of an infant child to a relation who has brought it up, and had the guardianship and control of it for a lengthened period, the Court of Chancery will not interfere, and will not compel the restoration of the child to the parent, if the effect of the proceeding would be productive of serious injury to the position and prospects of the child (e).

Whenever an infant is in the custody of the mother, or of any third party, the courts of common law will compel her or the party having the child to deliver it into the custody of the father, unless it appear to the court that the child will be improperly restrained, or its morals contaminated, by being placed in the father's custody (f). The power of the father over the child seems to be subordinate, even in a court of common law, to the higher interests of the state; so that the court will not interfere in favour of a father who has been convicted of felony, and who is manifestly an improper person to have the guardianship of the infant (g). The courts of common law have authority to restore the father to his rights, but they have no power to compel him to perform his duty.

(c) 20 & 21 Vict. c. 85, ss. 17, 18.

(d) *Reg. v. Smith*, 22 Law, J., Q. B. 110; 17 Jur. 24.

(e) *Lyons v. Blenkin*, Jac. 245. *Preston in re*, 5 D. & L. 233; 17 Law, J., Q. B. 221. *Fynn in re*, 2 De Gex & Smale, 457; Anon. 2 Sim. N. S. 54.

(f) Cresswell, J., *Hakewill in re*, 12 C. B. 232. *Ex-parte M'Clellan*, 1 Dowl. P. C. 81; 13 C. B. 680.

(g) *Blisset's case*, Lofft. 748. *Rex v. Wilson*, 4 Ad. & E. 645 n. *Ex-parte Bailey*, 6 Dowl. P. C. 311.

Right of guardians for nurture to the custody of infant children.—Guardianship for nurture continues until the child has attained the age of fourteen years; and guardians for nurture may, by habeas corpus, get possession of the child during the period, unless it be shown that he is scandalously immoral, or wants the child for an improper purpose (*h*), for every guardian for nurture has by law a right to the custody of the child (*i*).

Of the inability of courts of common law to interfere with the right of the father to the custody of his children, or to compel him to fulfil his parental duties.—The courts of common law have professed themselves incompetent to control the right of the father to the custody of his infant children, and have decided that they have no power to interfere to take an infant child from the custody of its father, excepting for the purpose of removing improper and unjustifiable restraint of the person of the child, and protecting it from personal ill-usage and gross cruelty. Thus, where an Englishwoman married a Frenchman, and then separated herself from him on account, as she alleged, of ill-treatment, taking with her her infant at the breast only eight months old, and the foreign husband came to her house, seized the child, carried it away with him half-naked in inclement weather, the Court of Queen's Bench held that it could not interfere for the purpose of taking the child from the father and restoring it to the mother, as the father had by the common law an undoubted right to the custody of his child (*k*). And the courts of common law have decided that they have no jurisdiction to interfere to take a child out of the custody of its father, although the father's cruelty to the mother has rendered it impossible for her to live with him, and he is himself confined in gaol, and cohabiting there with a profligate woman, who takes the child daily to the prison to see him (*l*).

Of the controlling power exercised by the Court of Chancery over the father's right to the custody of his infant children.—The Court of Chancery, on the other hand, representing the sovereign as *parens patriæ*, exercises a general control over the maintenance and education of all the Queen's subjects within its jurisdiction, and will restrain the father from acquiring possession of the person of his infant children when he has deserted their mother, and has by immoral conduct proved himself to be unfit to have the guardianship of them, and the interference of the court is necessary to protect the child from temporal ruin or spiritual peril (*m*).

(*h*) *Race in re*, 26 Law, J., Q. B. 169.

(*i*) Com. Dig. Guardian (D).

(*k*) *Rex v. De Manneville*, 5 East. 221.

(*l*) *Skinner ex parte*, 9 Moore, 278.

Rex v. Greenhill, 6 N. & M. 255; 4 Ad. & E. 624.

(*m*) *Thomas v. Roberts*, 3 De Gex & Smale, 781; 19 Law, J., Ch. 506. *Creuze v. Hunter*, 2 Cox, 242.

When the conduct of the father has been such as to render it impossible that the wife can live with him, and the court has therefore the painful duty cast upon it of deciding whether the children shall be brought up by one parent or the other, it will adopt that custody which seems best for the interests of the children.

The grounds upon which the court has deprived a father who has deserted or driven away his wife of the custody of his children, and placed them under the care of the mother, or a guardian appointed by the court, are, notorious impiety and irreligion, profligacy and adultery (*n*), teaching the children to swear, and introducing them to low company and immoral companions (*o*); the public avowal by the father of his being an atheist, and the publication by him of books deriding the truth of the Christian revelation and denying the existence of God (*p*). There are no bounds to the interference of the Court of Chancery with the rights of the father to the custody of his children, whenever his misconduct has brought about a separation between himself and the mother of those children, and his natural rights to the custody of them clash with their true interests; but it is a jurisdiction which the court is extremely reluctant to exercise (*q*), and will not be exercised upon the mere consideration of what may be manifestly for the benefit of the children.

Before the jurisdiction can be called into action, the court must be satisfied, not only that it has the means of acting safely and efficiently, but that the father has so conducted himself as to render it essential to the safety of the children, or to their welfare in some very serious respect, that his acknowledged rights should be superseded or interfered with (*r*). The mere fact of the father's having committed adultery, or of his keeping up an adulterous intercourse and being separated from his wife, has been held not to be sufficient of itself to warrant the interference of the court with his natural right to the custody of his children (*s*). But it is now competent to the Divorce Court, whenever a decree has been pronounced for a judicial separation by reason of the adultery of the husband, to order the infant children of the marriage to be placed under the custody of the mother.

When the court is compelled, in consequence of the profligacy or immorality of the father, to remove female children from the contamination of his example, it will not accompany that measure with the great evil of separating one portion of the family from the other; "for if one

(*n*) *Shelley v. Westbrooke*, 1 Jac. 264.
Warde v. Warde, 2 Phill. 791.

(*o*) *Wellesley v. Wellesley*, 2 Bligh.
N. S. 124.

(*p*) *Shelley v. Westbrooke*, Jac. 266.

(*q*) *Id.* *Cranworth, Hope v. Hope*, 23
Law, J., Ch. 689.

(*r*) *Curtis v. Curtis*, 34 Law, T. R. 10.

(*s*) *Ball v. Ball*, 2 Sim. 35.

child were to be brought up by the father and the other by the mother, that very circumstance would create factions in the family, which it is the bounden duty of the court, as far as possible, to guard against (t).

Of the jurisdiction of the Court of Chancery over the custody of the children of British subjects born abroad.—According to the doctrine of our law, the sovereign, as *parens patriæ*, has an interest in the maintenance and education of all its subjects, whether they be resident within the realm or domiciled abroad. The child of a British father, born abroad, is a British subject, and is by statute, to all intents and purposes, to be deemed as if born in England; and the Court of Chancery, as representing the sovereign, will afford its aid, when requisite, in favour of the children of British subjects born abroad. Relief may be sought, and the jurisdiction of the court exercised, on behalf of an infant that is not, at the time the jurisdiction is asked for, within the control of the court. It may be that a child is out of the jurisdiction under such circumstances, that no jurisdiction can be exercised because no order can be enforced; and in such a case there is not a want of jurisdiction, but a want of power of enforcing jurisdiction. If parties abroad have property here, the court will proceed against that property to enforce obedience to its decrees (u).

Of the jurisdiction of the Court of Chancery over the children of foreigners in this country.—The Court of Chancery exercises the same jurisdiction over the custody of foreign children in this country that it does over native children; and the reason is, that foreign children, as well as foreign adults, owe allegiance to the crown, and are, to a certain extent, subjects of the crown, as long as they are in this country (x).

Right of access of mothers to their infant children and to the custody of children under seven years of age.—The statute 2 & 3 Vict. c. 54, s. 1, enables the Lord Chancellor and the Master of the Rolls, upon the petition of the mother of any infant in the sole custody or control of the father, or of any person by his authority, or of any guardian after the death of the father, to make order for the access of the petitioner to such infant, at such times, and subject to such regulations, as he shall deem just. The Lord Chancellor and the Master of the Rolls are also empowered (ss. 3, 4), on the petition of the mother of any infant under the age of seven years, to order that such infant shall be delivered to, and remain in the custody of, the mother, until the infant attains that age: the order to be enforced, in case of disobedience, by process of contempt; but no order is to be made in favour of any mother against whom adultery shall be established by judgement in an action for crim. con., or by the

(t) *Warde v. Warde*, 2 Phill. 791.

(u) *Hope v. Hope*, 23 Law, J., Ch. 686.

(x) *Ib.* 688; 2 Eq. R. 1047.

sentence of an ecclesiastical court. This statute does not destroy the right of the father to the sole custody of his infant child, but introduces new elements and considerations under which that right is to be exercised. "The act," observes Sir G. Turner, V. C., "proceeds upon three grounds. First, it assumes and proceeds upon the existence of the paternal right. Secondly, it connects the paternal right with the marital duty, and imposes the marital duty as the condition of recognizing the paternal right. Thirdly, the act regards the interest of the child, for on no other grounds can I account for the distinction taken between the cases of children above and under seven years of age. These three grounds, then—the paternal right, the marital duty, and the interest of the child—are to be kept in mind in deciding any case under this statute." Unless there has been a clear neglect by the father of his duty as a husband in some important particular affecting the interests of the child, the court will not deprive him of his right to the custody of it; nor will it interfere to give the wife access to the child if it be proved that she is an habitual drunkard, or that intercourse between the mother and child would be likely to be prejudicial to the interests of the child (*y*). Although the child is, at the time of the presentation of a petition by the mother, and continues to be, in the custody of the mother, the Court of Chancery has, within the equity of the act, jurisdiction to interfere (*z*).

Of the right of the mother to the custody of her children on the death or transportation of the father.—On the death of the father, the surviving mother has an absolute right to the custody of her infant children (*a*), and if the father is convicted of felony, and sentenced to be transported, the courts of common law will grant a habeas corpus to bring up the infants, that they may be delivered to the mother (*b*).

Of the obligation of parents to provide for their children.—By the common law, a father who gives no authority to another, and enters into no contract, is no more liable for goods supplied to his child, than a brother, or an uncle, or a mere stranger would be. "In order to bind a father in point of law for a debt incurred by his son, you must prove that he has contracted to be bound, just in the same manner as you would prove such a contract against any other person" (*c*); but the stat. 43 Eliz. c. 2, s. 7, for the relief of the poor, provides that the father and grandfather, and mother and grandmother, and the children of every poor, old, blind, lame, and impotent person, or other poor person not able to work, being of sufficient ability, shall, at their own charges, relieve and maintain every

(*y*) *Halliday in re*, 17 Jur. 56; V. C. T.

(*z*) *Tomlinson in re*, 3 De Gex & Smale, 372.

(*a*) 2 & 3 Vict. c. 54, s. 1.

(*b*) *Ex-parte Bailey*, 6 Dowl. P. C. 311.

(*c*) *Ld. Abinger, Mortimore v. Wright*, 6 M. & W. 487.

such poor person, according to an assessment to be made by justices of the peace at their general quarter sessions; and the stat. 4 & 5 Wm. 4, c. 76, s. 56, provides, that all parish relief given to the wife or to a child under the age of sixteen, not being blind, or deaf, or dumb, shall be considered as given to the husband or parent, as the case may be, and may be treated (s. 58) as a loan to the latter, and may be recovered in the mode thereby appointed (s. 59).

Proceedings before the Court for Divorce and Matrimonial Causes must be commenced by the filing of a petition in writing, setting forth the ground of complaint, accompanied by an affidavit made by the petitioner, verifying the facts stated in the petition of which the petitioner has personal cognizance; and when the petitioner is seeking a decree of nullity of marriage, or a decree of judicial separation, or a dissolution of marriage, or a decree in a suit of jactitation of marriage, the affidavit must state that no collusion or connivance exists between the petitioner and the other party to the alleged marriage. The petitioner must then issue and serve a citation upon the respondent, together with a copy of the petition, certified under the seal of the court, in accordance with the rules of practice and procedure of the court, and the respondent must file his answer, containing either a simple denial of the facts stated in the petition, or setting up special matters of defence verified by affidavit, and negating collusion and connivance in certain specified cases (*d*).

Petitions for the restitution of conjugal rights must be made by writing, setting forth the marriage, the withdrawal of the party proceeded against from cohabitation, without just cause or lawful excuse, and must pray that the defendant, whether husband or wife, may be compelled to return to cohabitation. Every such petition must be accompanied by an affidavit made by the petitioner, verifying the facts stated in the petition (*e*). The defendant in answer may plead not guilty, or deny the marriage, or plead in bar the adultery or cruelty of the plaintiff. A suspension of the cohabitation must be clearly proved, in order to warrant the interference of the court (*f*).

Petitions for the dissolution of marriage on the ground of adultery must state, as distinctly as the nature of the case permits, the facts on which the claim to have the marriage dissolved is founded. If the petition is presented by the husband, he must make the alleged adulterer a co-respondent to the petition, unless he is excused from so doing on special grounds (*g*). If the petition is presented by a wife, it is discretionary

(*d*) 20 & 21 Vict. c. 85, ss. 36-53, and the rules and orders for the regulation of Divorce and Matrimonial causes, 27 Law, J., Court of Probate, &c., Rules, pp. 81-80.

(*e*) Rules and Orders for the Divorce Court, Brandt's Law of Divorce, 207-214.

(*f*) Shelford on Marriage and Divorce.

(*g*) *Hooke v. Hooke*, 27 Law, J., Prob. & Matr. 61.

with the court to direct the person with whom the husband is alleged to have committed adultery to be made a respondent (*h*).

Where the petition in a suit for a dissolution of marriage by reason of adultery, set forth the celebration of the marriage, and the subsequent commission of divers specified acts of adultery, and the respondent in her answer put in several pleas or allegations of matters of defence, it was held that each plea must be taken by itself, and should *per se* be an answer to the matter to which it is pleaded; and if it contains only an answer to part of the charge, it should be pleaded to that part, as it is a very safe rule not to construe one plea by another (*i*).

Petitions to the Divorce Court respecting the custody of children.—As, in the ecclesiastical courts, acts of cruelty to children, committed in the presence of the mother, have, in some instances, been held cruelty to her, such acts may be alleged in a petition to the Divorce Court, praying for a judicial separation on the ground of cruelty, and also for an order respecting the custody of the children of the marriage; but at the hearing the court will confine the inquiry to the conduct of the husband and wife. In the majority of cases, enough will come out in the course of the inquiry to enable the court to give directions as to the custody of the children, and where this is not the case the court will require further evidence to be given before making any decree (*k*). The court will not deal with a petition for custody of children under the statute 22 & 28 Vict. c. 61, s. 4, until both parties are before it (*l*).

Evidence on the hearing of petitions—Competency of the husband and wife to give evidence.—The Amendment of Evidence Act (14 & 15 Vict. c. 99), rendering parties to actions and suits competent and compellable to give evidence, does not apply to any action, suit, proceeding, or bill, in any court of common law, or in any ecclesiastical court, or in either house of parliament, instituted in consequence of adultery; and the Evidence Amendment Act, 1853 (16 & 17 Vict. c. 83, s. 1), rendering the husbands and wives of the parties to any action or suit competent and compellable to give evidence, does not (s. 2) render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband, in any proceeding instituted in consequence of adultery; but by 22 & 28 Vict. c. 61, s. 6, it is enacted, that on any petition presented by a wife, praying that her marriage may be dissolved by reason of her husband having been guilty of adultery coupled with cruelty, or of adultery

(*h*) 20 & 21 Vict. c. 85, ss. 27, 28.

Prob. & Matr. 46.

(*i*) *Tourle v. Tourle*, 27 Law, J., Prob. & Matr. 52.

(*l*) *Stacey v. Stacey*, 29 Law, J., Prob. & Matr. 63.

(*k*) *Suggate v. Suggate*, 28 Law, J.,

coupled with desertion, the husband and wife respectively shall be competent and compellable to give evidence of or relating to such cruelty or desertion.

Evidence of co-respondents.—The co-respondent in a suit for dissolution of marriage is not a competent witness so long as he remains a party to the record (m); but after the close of the evidence on the part of the petitioner the court may direct the co-respondent to be dismissed from the suit, if it thinks there is not sufficient evidence against him (n), and he may then be examined as a witness in the cause.

Mode of taking evidence.—Witnesses in proceedings before the court, where their attendance can be had, are to be sworn and examined orally in open court; but parties, except where otherwise provided by the statute, are at liberty to verify their respective cases, in whole or in part, by affidavit, but so that the deponent in every such affidavit shall, on the application of the opposite party, or by direction of the court, be subject to be cross-examined by, or on behalf of, the opposite party, orally in open court, and after such cross-examination re-examined by or on behalf of the party by whom the affidavit was filed. The court may, if it thinks fit, order the attendance of the petitioner, and examine him, or permit him to be examined, or cross-examined, on oath, on the hearing of any petition; but no petitioner is bound to answer any question tending to show that he has been guilty of adultery.

In all suits and proceedings other than proceedings to dissolve any marriage, the court is to proceed and give relief (s. 22), on principles and rules as nearly as may be conformable to the principles and rules on which the ecclesiastical courts have hitherto acted and given relief. It is the duty of the court, upon the hearing of any petition for the dissolution of marriage, to satisfy itself so far as it reasonably can, not only as to the facts alleged, but also whether or no the petitioner has been in any manner accessory to, or conniving at the adultery, or has condoned the same. It is its duty also to inquire into any counter-charge which may be made against the petitioner, and (s. 30) if not satisfied, to dismiss the petition. In a suit for a dissolution of marriage, where the co-respondent has appeared but has put in no answer, he will not at the hearing of the petition be allowed to take any part in the proceedings. The main object of the Divorce Act in requiring the adulterer to be joined as a co-respondent being to give him an opportunity to vindicate his character, the correct practice appears to be that the case of the wife, which is the

(m) *Robinson v. Robinson*, 27 Law, J., Prob. & Matr. 91.

(n) 21 & 22 Vict. c. 106, s. 11.

principal one, should be gone into before that of the co-respondent, which is merely accessory to it (o).

Appeal to the full court and the House of Lords.—Either party dissatisfied with the decision of the Judge Ordinary may, within three months, appeal therefrom to the full court, whose decision is (s. 55) final. An appeal is also given (s. 56) to the House of Lords from the decision of the full court, on any petition for the dissolution of marriage.

Trial of questions of fact before a jury.—By 20 & 21 Vict. c. 85, s. 28, it is enacted, that either of the parties to a petition praying for the dissolution of marriage on the ground of adultery, may insist on having the contested matters of fact tried by a jury; and by s. 36 it is further enacted, that in all questions of fact arising in proceedings under the act it shall be lawful for, but, except as thereinbefore provided, not obligatory upon the court to direct the truth thereof to be determined before itself, or before any one or more of the judges of the court, by the verdict of a special or common jury.

When the proceedings have raised the questions of fact necessary to be determined either party may, within fifteen days from the filing of the last proceeding, apply to the Judge Ordinary to direct the truth of any question of fact arising in the proceedings to be tried by a jury. If neither party claim that the cause shall be heard before a jury, the Judge Ordinary must determine whether the same shall be tried by a jury or before the court itself, and whether by oral evidence or upon affidavit. And whenever a cause is to be tried before a jury, the Judge Ordinary is to direct the questions at issue to be stated in the form of a record, to be settled by one of the registrars (p). In a suit for a judicial separation the parties cannot, as in a suit for a dissolution of marriage, demand, as a matter of right, that the issues of fact be tried by a jury; but the court has a discretionary power, under s. 36 of the Divorce Act, to grant or refuse the application for a jury. It will generally, however, on the application of either party, direct questions of fact to be tried by a jury (q). And in cases which have to be tried before the full court, in which there is likely to be any considerable controversy as to the facts, trial by jury will generally be directed (r).

Upon the trial of any question of fact before a jury, the court or judge has (s. 38) the same power, jurisdiction, and authority as any judge of any of the superior courts sitting at nisi prius. A bill of exceptions

(o) Cockburn, C. J., *Robinson v. Robinson*, 27 Law, J., Prob. & Matr. 92.

(p) 20 & 21 Vict. c. 85, s. 38, and the Matrimonial causes, rules, and orders,

27 Law, J., p. 82; R. 20-23.

(q) *Marchmont v. Marchmont*, 27 Law, J., Prob. & Matr. 59.

(r) *Ratcliffe v. Ratcliffe*, ib. 60.

may (s. 39) be tendered, and a general or special verdict, subject to a special case, may be returned as in causes tried in the superior courts, and the matter of law heard and determined by the full courts, subject to such right of appeal as is given by the statute.

Proceedings at the trial.—The evidence at the trial of questions of fact before a jury in divorce and matrimonial causes, must be confined to the issues raised on the record as settled by the registrar. A respondent, therefore, cannot prove anything which he has not pleaded; but he will generally have an opportunity of pleading material facts afforded to him at any stage of the proceedings, on such terms as seem equitable to the court (s). When by the record the marriage is not denied, and the respondent admits the withdrawal from cohabitation, but denies that it was without lawful cause, and goes on to specify the lawful cause: the respondent is entitled to begin (t).

Evidence of condonation.—When the issues are to be tried by a jury, the question whether or not there has been condonation is a question of fact to be decided by the jury, and not a question of law. It is for the court to direct the jury what will constitute a condonation, and for the jury to determine whether, subject to that direction, the circumstances of the particular case amount to condonation (u).

Petitions for damages from adulterers.—By the Divorce and Matrimonial Causes' Act, 20 & 21 Vict. c. 85, s. 59, the action for criminal conversation is abolished, but by s. 33 of the same statute it is enacted, that any husband may either in a petition for dissolution of marriage, or for judicial separation, or by petition only, claim damages from any person on the ground of his having committed adultery with the wife of such petitioner, and such claim is to be heard and tried on the same principles, in the same manner, and subject to the same or the like rules and regulations, as actions for criminal conversation were formerly tried and decided in courts of common law, and the damages to be recovered are in all cases to be ascertained by the verdict of a jury, although the respondents or either of them may not appear (x). The petition must be addressed to the Court for Divorce and Matrimonial Causes, and must be served on the alleged adulterer and the wife, unless the court shall dispense with such service, or direct some other service to be substituted.

Of the pleadings in claims for damages resulting from adultery.—The pleadings in claims for damages from any person on the ground of his having committed adultery with the wife of the claimant, resemble the

(s) *Plumer v. Plumer*, 29 Law, J., Prob. & Matr. 68.

(t) *Cherry v. Cherry*, 28 Law, J., Prob. & Matr. 86. *Bacon v. Bacon*, 29 ib. 61.

(u) *Peacock v. Peacock*, 27 Law, J., Prob. & Matr. 71.

(x) 20 & 21 Vict. c. 85, s. 32.

pleadings formerly used in actions for criminal conversation. The statement of the cause of action simply is, "that the defendant debauched and carnally knew the plaintiff's wife," and the defendant either pleads "not guilty," or alleges that he did what was complained of by the plaintiff's leave, and the plaintiff replies, taking issue upon the defendant's plea. The plea of not guilty puts in issue only the fact of the commission of the wrongful act, so that the plaintiff under this plea cannot be put to the proof of the marriage (y). If, therefore, the defendant wishes to show that no valid marriage was ever celebrated between the claimant and the person alleged to be his wife, he must traverse the allegation in the statement of the cause of action, that the woman alleged to have been debauched by the defendant was the wife of the plaintiff.

Evidence at the trial of a claim for damages for adultery — Proof of the marriage.—In order to establish a *prima facie* case for damages from a defendant who is charged with having committed adultery with the claimant's wife, it is necessary to prove a legal marriage between the claimant and the woman alleged to be his wife. It is not enough to show that he and his alleged wife intended to celebrate, and did in their belief celebrate, a lawful and formal marriage, and did afterwards cohabit as man and wife upon the faith of this *bona fide* belief, for the burthen is on him to prove a clear legal marriage, whereby the relation of husband and wife is really created; and the mere proof of a ceremony which the parties suppose to be sufficient to constitute that relation is not enough. It must be shown to be sufficient according to law for that purpose (z).

Proof of marriage by certified extracts from parochial registers of marriages.—The statute 52 Geo. 2, c. 146, formerly provided (ss. 1–5) for the making and keeping by the rector, vicar, curate, or officiating minister of every parish or chapel where marriages, &c., have been celebrated according to the rites of the Established Church, of a publick register of such marriages, and for the transmission (ss. 6, 7) of annual copies of such registers to the registrar of the diocese, and for the making and preserving (s. 12) of alphabetical lists and indexes, to be open to publick search at all reasonable times, on payment of the usual fees. But this statute, so far as it relates to the registration of marriages, has been repealed by 6 & 7 Wm. 4, c. 86, which provides (s. 2) a general register office in London for keeping a register of marriages, &c., and provincial registers (s. 9) in every union. Marriage-register books are to be furnished to the rector, vicar, or curate of every church or chapel, and to the registering officers of the various bodies of Dissenters, in whose chapels marriages are

(y) *Kenrick v. Horder*, 7 Ell. & Bl. 265; 13 Law, J., Exch. 394. *Morris v. Miller*, 1 W. Bl. 682; 4 Burr. 2057.

(z) *Catherwood v. Caslon*, 13 M. & W.

celebrated (s. 30), who are required (s. 31) to register therein all marriages, and forward (s. 33) certified copies thereof to the superintendent registrars, who are to send them (s. 34) to the Registrar-General, to be arranged for public inspection. By s. 35 it is enacted, that every rector, vicar, or curate, and every registrar, registering officer, and secretary, who shall have the keeping for the time being of any register-book of marriages, &c., shall at all reasonable times allow searches to be made of any register-book in his keeping, and shall give a certified copy, under his hand, of any entry or entries in the same, on payment of certain specified fees. Provision is also made for searches at the superintendent registrar's office (s. 36), and the General Register Office (s. 39), and for the issue of certified copies under the hand of the superintendent registrar (s. 36), and under the seal of the Registrar-General. And all certified copies of entries, purporting to be sealed or stamped with the seal of the General Register Office, are to be received as evidence, without any further or other proof of such entry; and no certified copy purporting to be given in the said office, which is not sealed or stamped as aforesaid, is to be of any force or effect.

Proof of marriage through the medium of examined copies and certified extracts from non-parochial registers.—The Marriage Act, 6 & 7 Wm. 4, c. 85, also provides (s. 4) for notices of intended marriages to be given to the Superintendent Registrar of Marriages, who is (s. 5) to file such notices, and to furnish therefrom to the Registrar-General a book, to be called "the Marriage-Notice Book," which is to be open at all reasonable times to persons desirous of inspecting it. Provision is made for the appointment of registrars of marriages, for registering (s. 18) places of worship for the solemnization of marriages in the presence (s. 20) of the registrar; for the registration (s. 23) of such marriages; for the making and delivering (s. 24) of certified copies of the entries of marriage in the register to the superintendent registrar, to be kept by him with the records of his office. And by the statute 3 & 4 Vict. c. 92, and 21 & 22 Vict. c. 25, ss. 1 and 2, provision is made for the verification and deposit in the custody of the Registrar-General of various non-parochial registers of marriages, &c., for the framing of lists of all such records and registers; for the making of searches, and the grant (3 & 4 Vict. c. 92, s. 5) of certified extracts: also (s. 6) for the production in courts of justice of such original registers and records; for the issue (s. 9) of certified extracts therefrom, sealed with the seal of the General Register Office; for the admission of such certified extracts on the trial of causes, but not on criminal trials (s. 11), after notice given to the opposite party in sufficient time before the trial to enable him to inspect the original register or record; also (s. 12) for the use of the original register or record in

evidence after notice. In criminal cases, the original register or record is required (s. 18) to be produced, and notice given of the intention to use it.

Marriages of British subjects solemnized abroad, may be proved through the medium of certified copies of the consular registers, which are transmitted annually to the Registrar-General (a).

Proof of the marriage having been celebrated in a registered place of worship.—By 19 & 20 Vict. c. 119, s. 24, the Registrar-General is required to give to any one demanding the same a certified copy of the returns made to him, or an extract therefrom, with respect to any place of meeting for religious worship contained therein.

Incompetency of the husband and wife to prove the marriage.—The statutes enabling husbands and wives to give evidence against each other in certain cases do not render them competent witnesses to prove the marriage in claims for damages from adulterers (b).

Marriages, therefore, may be proved by a copy or extract from the register, purporting to be signed and certified as a true copy or extract by the parish-officer, whether incumbent, rector, vicar, or curate, who has the custody of such register (c). And the identity of the claimant and his wife with the parties named in the register, as having been married at the time and place therein mentioned, may be proved by any person who was present at the ceremony, or by any evidence sufficient to satisfy a jury of their identity (d).

The fact of the marriage may also be proved by the testimony of an eye-witness of the ceremony, without the production of any examined or certified extract from the register. Where a witness deposed that he was present in a Wesleyan chapel, and that a form of marriage was there celebrated between A and B, in the presence of the registrar of marriages, and spoke to all the circumstances attending the ceremony, the entry in the registrar's book, a copy of which was produced at the trial, it was held that this was *prima facie* evidence of the due solemnization of a marriage between the parties in a duly registered chapel, in which marriages might be legally solemnized (e).

Evidence on the part of the defendant.—It is no answer to a claim by a husband for damages from a person who is alleged to have committed adultery with his wife, to show that he has made a similar claim against

(a) 12 & 18 Vict. c. 68, ss. 11, 12, 18. As to the admissibility of a certificate of a foreign marriage, *Abbott v. Godoy*, 29 Law, J., Brob. & Matr. 57.

(b) *Ante*, pp. 686, 687. Taylor on Evidence, pp. 1091–1095.

(c) *Re Hall's estate*, 22 Law, J., Ch. 177; 14 & 15 Vict. c. 99, s. 14.

(d) *Birt v. Barlow*, 1 Doug. 174.

(e) *Reg. v. Mainwaring*, 26 Law, J., M. C. 11.

another man, and recovered damages from him (*f*); but the fact may be given in evidence in reduction of damages: for where the plaintiff's wife had not been criminally connected with the defendant alone, Lord Ellenborough directed the jury to award damages proportioned to so much of the plaintiff's loss of comfort, &c., as they might suppose to have been occasioned by the defendant's misconduct, and not to give damages for the whole of the injury that the plaintiff had sustained (*g*). If the claimant has connived at the adulterous intercourse (*h*), or if he has suffered or encouraged his wife to live in a state of prostitution, he cannot come into a court of justice to ask for damages. "His having suffered such connexion with other men, is equally a bar to the action as if he had permitted the defendant to be connected with her" (*i*).

The infidelity of the husband himself constitutes no bar to the claim for damages from the adulterer, but it may be given in evidence in mitigation of damages (*k*).

Of the damages recoverable in cases of adultery.—The injury suffered by the husband from the seduction of his wife depends upon the circumstances and situation in life of the husband at the time of the seduction, upon the mode in which he fulfilled his marital duties, the terms upon which the husband and wife were living together, and upon the general character of the wife at the time she was led astray. These are circumstances for the proper and sole cognizance of the jury, and the court will not interfere with their estimate of damages unless it is manifestly and palpably outrageous (*l*). It was formerly considered that a husband who had voluntarily relinquished the society of his wife, and separated himself from her, had no claim for damages against a person who had subsequently seduced her, the loss of the comfort and society of the wife being considered to be the gist of the action (*m*); but it is now held that the separation is no bar to the husband's claim for damages (*n*): it is a fact, however, to be taken into consideration by a jury in estimating the amount of them.

It may be shown, in reduction of damages, that the husband deserted or neglected his wife, or threw her in the way of temptation, or treated her with coldness, and as a person whom he did not esteem or regard; also that the marriage was kept secret, and that the wife was allowed to live with her mother, and pass as a single woman, and that she was not known by the defendant to be married at the time of the commission of

(*f*) *Gregson v. M'Taggart*, 1 Campb. 415.

(*g*) *Gregson v. Theaker*, ib. n.

(*h*) *Cibber v. Sloper*, cited 4 T. R. 855.

(*i*) Per Lord Kenyon, *Hodges v. Wind-*

ham, Peake, 54.

(*k*) *Bromley v. Wallace*, 4 Esp. 237.

(*l*) *Wilford v. Berkeley*, 1 Burr. 609.

Duberley v. Gunning, 4 T. R. 657.

(*m*) *Weedon v. Timbrell*, 5 T. R. 357.

(*n*) *Chambers v. Caulfield*, 6 East. 256.

the adultery (*o*). Proof of adulterous intercourse between the wife and other men prior to the commission of the adultery with the defendant, may be given in evidence in reduction of damages, for the purpose of showing that the claimant has lost a wife who was worth nothing (*p*). Letters also written by the claimant's wife before the commission of the adultery, soliciting the defendant's addresses, and enticing him into the adulterous connexion, are admissible in evidence in mitigation of damages, but not proofs of misconduct subsequent to the commission of the adultery (*q*).

When the husband and wife are separated from each other the wife's letters to her husband are admissible in evidence for the purpose of showing the state of her affections at the time of the writing of the letters; but to remove all grounds for any suspicion of collusion between the husband and wife, it should be proved that the letters were written at the time they bear date, and before there was any knowledge or suspicion of the adulterous intercourse (*r*). Such letters are not to be rejected merely because they contain statements of specific facts calculated to influence the minds of the jury, and which are not strictly evidence. But the jury must be cautioned not to allow themselves to be influenced by the particular facts alluded to (*s*).

Evidence of the defendant's circumstances or property has been held to be inadmissible for the purpose of enhancing the damages, it being considered that the jury ought to give compensation for the injury sustained without reference to the wealth of the defendant (*t*). But evidence of the humble condition in life, and of the poverty of the defendant, has been received in mitigation of damages, and for the purpose of showing that the allurements and temptations to the commission of the adultery did not emanate from the defendant.

Effect of the death of the wife pending the proceedings for damages.—If it appears that the wife has died during the pendency of the proceedings, the jury should give damages for the shock which has been given to the feelings of the husband, and for the loss of the society of the wife down to the time of her death, though it appear that the husband was wholly unaware of his own dishonour until the disclosure was made to him by his wife on her death-bed (*u*).

Application of the damages recovered—Payment of costs.—After verdict, the Court for Divorce and Matrimonial Causes is to direct in what manner

(*o*) *Calcraft v. Earl Harborough*, 4 C. & P. 501.

(*p*) *Alderson, J., Winter v. Henn*, 4 C. & P. 498.

(*q*) *Elsam v. Faucett*, 2 Esp. 502.

(*r*) *Trelawney v. Coleman*, 1 B. & Ald. 90; 2 Stark. 191. *Edwards v. Crock*, 4

Esp. 38.

(*s*) *Willis v. Bernard*, 1 M. & Sc. 584; 8 Bing. 376.

(*t*) *Alderson, B., James v. Biddington*, 6 C. & P. 590.

(*u*) *Wilton v. Webster*, 7 C. & P. 198.

the damages are to be applied, and is empowered to settle the whole, or any part thereof, for the benefit of the children (if any) of the marriage, or as a provision for the maintenance of the wife. And whenever, in any petition presented by a husband, the alleged adulterer shall have been made a co-respondent, and the adultery shall have been established, the court may order the adulterer to pay the whole or any part of the costs of the proceeding (x).

SECTION II.

OF SEDUCTION.

Of the harbouring of married women and inducing them to live apart from their husbands.—Every person who receives a married woman into his house, and suffers her to continue there after he has received notice from the husband not to harbour her, is liable to an action for damages, unless the husband has, by his cruelty or misconduct, forfeited his marital rights, or has turned his wife out of doors, or has, by some insult or ill-treatment, compelled her to leave him. Where a married woman came to the defendant's house and represented herself to have been very ill-used by her husband, who, she said, had turned her out of doors, and upon this representation the defendant received her into his house, and suffered her to continue there after he had received notice from the husband not to harbour her, Lord Kenyon held that an action could not be maintained against him, as he appeared to have acted solely from principles of humanity (y), and that, if a husband ill-treats his wife, so that she is forced to leave his house through fear of bodily injury, any person may safely, nay honourably, receive her and protect her (z). Where the plaintiff's declaration of his cause of action alleged that his wife departed from him and continued absent without his consent, and during that time considerable property was devised to her separate use, and thereupon she was desirous of returning to the plaintiff and cohabiting with him, but that the defendant persuaded and procured her to continue absent until the time of her death, whereby the plaintiff lost the comfort and society of his wife and the advantage which he ought to have had from her property, it

(x) 20 & 21 Vict. c. 85, ss. 82, 84.

(y) *Philp v. Squire*, Peake, 115.

(z) *Berthon v. Cartwright*, 4 Esp. 480.

was held that the declaration disclosed a good cause of action, and that every moment a wife continues absent from her husband without his consent it is a new tort, and every one who persuades her to do so does a new injury, and cannot but know it to be so (a).

Of the seduction and loss of service of servants.—Every person who knowingly and designedly interrupts the relation subsisting between master and servant by procuring the servant to depart from the master's service, or by harbouring him and keeping him as servant, after he has quitted his place, and during the stipulated period of service, whereby the master is injured, commits a wrongful act, for which he is responsible in damages (b). And if a servant or apprentice quits his master or employer without just cause, before his term of service expires, and another retains and employs him against the will of the master, and with notice of his having deserted the service of the latter, an action for damages is maintainable against him, as the very act of giving the servant employment is affording him the means of keeping out of his former service (c).

A taskworkman, who contracts with another by the job or piece, is the servant of that other until the work is finished, and no other person can, whilst such work is going on and is unfinished, lawfully employ the servant, if, by so doing, he causes him to leave his work unfinished, and has knowledge of the fact. Thus, where a journeyman shoemaker, living and working in his house, was employed by a shoe-manufacturer to make a certain number of shoes at so much per pair, to be completed by a given time, and the defendant took the man into his service, and thereby caused him to leave a number of shoes unfinished, and neglected to discharge him after having received notice from the plaintiff of the subsisting engagement between such workman and himself, he was held responsible in damages to the plaintiff for the injury (d). If the defendant has derived any benefit from the services of the servant or apprentice, the master is entitled to recover the value of it (e).

The master may maintain an action for compensation for the loss of the services of his servant through the tortious act of another, whether the servant be a child or not, provided it appear that the child was capable of rendering, and did render, some service, however trifling; but if no service was, or could be, performed by the child, an action is not maintainable.

Of injuries to parents in being deprived of the attentions and services of their

(a) *Winsmore v. Greenbank*, Willes, 580. Here the plaintiff recovered a verdict for 3000*l*.

(b) *Lumley v. Gye*, 2 Ell. & Bl. 224.

(c) *Blake v. Layton*, 6 T. R. 221. *Fawcett v. Beavres*, 2 Lev. 63; Leon. 240.

Hamilton v. Vere, 1 Lev. 290; 2 Saund. 169.

(d) *Hart v. Aldridge*, Cowp. 54. Bac. Abt. MASTER AND SERVANT, (O).

(e) *Foster v. Stewart*, 3 M. & S. 201.

children through the tortious act of another.—A parent has no remedy for an injury done to his child by the wrongful act of another, unless the child is old enough to be capable of rendering him some act of service, and can be treated in law as his servant. Thus, where the plaintiff brought an action against the defendant for carelessly driving over and injuring the plaintiff's child, whereby the plaintiff was deprived of the service of the child, and was obliged to expend a large sum of money in doctors and nurses, and it appeared that the child was only two years and a half old, and incapable of performing any act of service, it was held that the action was not maintainable (*f*). If the father of a child incurs necessary expense in curing his child from an injury wrongfully inflicted by the defendant, he cannot recover those expenses upon a declaration describing, as the cause of action, the obligation of the father to incur that expense.

Of injuries to parents from the seduction of their daughters.—The law gives no remedy to the parent for the mere seduction of his daughter, however wrongfully it may have been accomplished. Incontinence on the part of a young woman cannot be made the foundation of an action against the person who has tempted her and deprived her of her chastity (*g*); but if she is living with her parent at the time of the seduction, and the seduction is followed by pregnancy and illness, whereby the parent is deprived of the filial services theretofore rendered to him, an action is maintainable against the seducer.

Of loss of service from the seduction of daughters and servants.—The foundation, therefore, of the action by a father to recover damages against a wrongdoer for the seduction of his daughter has been uniformly placed, from the earliest time hitherto, not upon the seduction itself, which is the wrongful act of the defendant, but upon the loss of the service of the daughter, in which service he is supposed to have a legal right or interest. It has, consequently, always been held, that the loss of service must be alleged in the declaration of the cause of action, and be proved at the trial, or the plaintiff must fail. It is not enough for the father to show that his daughter was a poor person maintaining herself by her labour, that the defendant seduced her and got her with child, and that she became unable to maintain herself, and that the father was forced to maintain her at his own expense, and to pay for doctors and nurses to attend upon her, &c. (*h*); or that the father had apprenticed her to the defendant, and paid him a large sum of money to instruct her in a trade, but that the defendant seduced her and got her with child, and rendered her unable to

(*f*) *Grinnell v. Wells*, 7 M. & Gr. 315; 5 East, 47 n. 1041; 8 Sc. N. R. 741.

(*h*) *Grinnell v. Wells*, 7 M. & Gr. 1041; 8 Sc. N. R. 741; 14 Law, J., C. P. 19.

(*g*) *Satherthwaite v. Duerst*, 4 Doug.

learn the trade (i). However slight the act of service may be, it must be a real genuine service, such as the parent may command. The making tea, or doing any household work at the command of the parent, is, however, quite sufficient to constitute the relationship of master and servant when the girl is residing with her father and mother (k).

Effect of the absence of the daughter from the parent's roof at the time of the seduction. — As the loss of service is the foundation of the action, it follows that the relation of master and servant must subsist between the plaintiff and the person seduced at the time of the seduction, for otherwise the defendant's act does not infringe upon the plaintiff's rights, or deprive him of anything then belonging to him. If, therefore, the daughter, at the time she was seduced, was at the head of an establishment of her own, and her father was living with her as a visitor in her own house, she cannot be treated as being in the subordinate position of a servant, and the father cannot maintain an action for loss of service (l). If the daughter, at the time she was seduced, did not reside with the father, but was living away from home in the service of another person: the father has no ground of action for the seduction (m), unless the person with whom she is living inveigled her away from home into a pretended service, for the very purpose of seducing her (post, p. 699), although it be alleged in the declaration, and proved at the trial, that the absence was only temporary, and that she intended to return and live with her father after the term of service had expired (n). But if she is away only on a temporary visit, and still forms part of her father's family, and makes herself serviceable to him when she is at home, such temporary absence constitutes no impediment to an action by the father for damages (o). Whenever the girl is away in actual service, the mere fact of her mistress being in the habit, from time to time, of allowing her to go home and assist her widowed mother in needlework, has been held to be insufficient to enable the mother to maintain an action for damages (p). If the relation of master and servant is contracted after the seduction, the loss of service cannot then be made the foundation of an action. The state of the case then, is, that the master has taken into his service a servant whose services are less valuable to him by reason of antecedent occurrences, and there is no consequential injury of which he has any right to complain as against the seducer (q).

(i) *Harris v. Butler*, 2 M. & W. 539.

(k) *Thompson v. Ross*, 29 Law, J., Exch. 1.

(l) *Manley v. Field*, 29 Law, J., C. P. 79.

(m) *Dean v. Peel*, 5 East. 47. *Grinnel v. Wells*, 7 M. & Gr. 1042; 8 Sc. N. R. 741.

(n) *Blaymire v. Haley*, 6 M. & W. 55. *Harris v. Butler*, 2 ib. 539.

(o) *Griffiths v. Teetgen*, 15 C. B. 344.

(p) *Thompson v. Ross*, 29 Law, J., Exch. 1; 8 W. R. Ex. 44; 35 Law, T. R., Ex. 43.

(q) *Davies v. Williams*, 10 Q. B. 728; 16 Law, J., Q. B. 369.

Of the decoying of daughters away from the service of their parents, under cover of a pretended hiring as a servant, and then seducing them.—If a person hires a girl as a servant, and withdraws her from her father's service for the very purpose of getting possession of her person and seducing her, this fraudulently-concocted service does not put an end to the relation of master and servant previously subsisting between the daughter and her father, and does not throw any impediment in the way of an action by the latter for the seduction. Thus, where the plaintiff's daughter, who was residing with the plaintiff, and rendering him service in domestic matters, advertised for a situation as lady's-maid, and the defendant, seeing the advertisement, proposed to engage her in that capacity for his sister, but afterwards hired her at weekly wages to take care of an empty house, where he seduced her and got her with child, it was held by Abbott, C. J., to be a question for the jury whether the daughter was withdrawn from her father's house by the defendant under a *bond fide* contract for her services, or the whole matter was a mere pretence and contrivance on the part of the defendant to get possession of her person. "If she was the servant of the defendant," observes his lordship, "the action certainly cannot be maintained; but had she ceased to be the servant of her father, the plaintiff? If the jury be of opinion that the defendant practised a fraud and contrivance to procure her to leave her father's house, without any real intention to hire her as a servant, I am of opinion that the action is maintainable." And afterwards, in summing up to the jury, his lordship said, "During the time that she was in her father's house she was his servant; was there an end put to that service? It is alleged by the defendant that there was, because he himself hired her for the purpose of keeping his own house at the rate of 7s. per week: but if he did not in reality hire her with that intention, but with the wicked view of seducing her, then I am of opinion that the relation of master and servant was never contracted between them" (r).

Seduction of married daughters and servants.—Where a married woman separated from her husband, returned to her father's house and lived with him, performing various acts of service, it was contended that a married woman was not capable of making any contract of service; but the court held that as against a wrongdoer, it was sufficient to prove that the relationship of master and servant *de facto* existed at the time of the seduction, and that, in the absence of any interference on the part of the husband, it was not competent to the defendant to set up his right to the services of his wife as an answer to the action (s).

Effect of proof that the defendant, though he seduced the girl, was not the

(r) *Speight v. Oliviera*, 2 Stark. 495.

(s) *Harper v. Luffkin*, 7 B. & C. 387.

father of the child of which she was delivered.—If the defendant, though he seduced the girl, was not the father of the child of which she was subsequently delivered, and did not consequently cause the pregnancy and illness, and the consequent loss of service, there is no cause of action against him (t).

Effect of the seduction and loss of service having been occasioned by the plaintiff's own misconduct and neglect of his parental duties.—It is expected of every parent that he should be jealous of, and watchful over, the honour of his daughter, and protect her, as far as possible, from the advances and solicitations of notorious libertines. If, therefore, he introduces her to profligate acquaintances, encourages improper intimacies, and invites the injury of which he complains, he has no ground of action for damages. Where the defendant proposed to marry the daughter of the plaintiff, and was received and entertained as her suitor at the plaintiff's house, and the plaintiff then ascertained that the defendant was a married man and a great libertine, notwithstanding which he allowed him to continue his addresses to the daughter, on the strength of certain assurances which he gave to the effect that his wife was afflicted with a mortal disease, and could not live long, and then he would marry the daughter, and the defendant ultimately seduced her, it was held, that as the plaintiff had by his own misconduct contributed to the injury of which he complained, he had no ground of action for redress (u).

Of the parties entitled to maintain an action for seduction.—To entitle a party to maintain an action for the seduction of a girl, it must be proved, as we have seen, that the relationship of master and servant existed between the plaintiff and the party seduced at the time of the seduction. The action may be brought by any person with whom the seduced girl was residing at the time she was seduced, either in the character of a daughter and servant, or as a ward and servant, or as a servant only. Thus, in the case of an orphan living with a relation, or a friend or benefactor, and rendering such domestic attendance and obedience as is usually rendered by a daughter to her father, the relation or benefactor is the proper party to sue for the wrong done (x). Standing *loco parentis*, he is permitted to recover damages ultra the mere loss of service, as when the action is brought by the actual parent (y).

Of the pleadings in actions for seduction.—If a declaration by a parent for the seduction of his daughter contains no allegation of the loss of the service of the daughter, it is bad in arrest of judgment. "The loss of service must be alleged in the declaration, and must be proved at the

(t) *Eager v. Grimwood*, 1 Exch. 61; 16 Law J., Exch. 286.

(u) *Reddie v. Scooll*, Peake, 316.

(x) Holl's Rep. 453 note.

(y) *Irwin v. Dearman*, 11 East. 24. *Edmonson v. Machell*, 2 T. R. 4.

trial, or the plaintiff must fail" (z). The defendant either pleads "not guilty," or that he did what is complained of by the plaintiff's leave, and the plaintiff replies, taking issue upon the plea (a). The plea of not guilty puts in issue both the fact of the seduction and the fact that the person seduced was the servant of the plaintiff (b). Under this plea the defendant may show that the seduced girl was in the service of a third person, and was not at the time of the seduction residing with the plaintiff; also that the defendant, though he had carnal knowledge of the seduced woman, was not the father of the child of which she was delivered, and, consequently, that the confinement and illness, and loss of service and expense, were not occasioned by the act of the defendant (c); also that the illness and consequent loss of service were not occasioned by the act of seduction, but by the defendant's leaving and abandoning the girl after he had seduced her (d); also that the seduced woman entered the service of her master in a state of pregnancy (e), or that the plaintiff was a party to his own dishonour, and by his own imprudence and misconduct has contributed to the injury of which he complains (f).

Evidence at the trial in actions for seduction — Proof of the relationship of master and servant.—As the loss of service is the foundation of the action for seduction, it is necessary to establish the relationship of master and servant between the plaintiff and the seduced girl, as well as to prove the fact of the seduction itself, in order to make out a case for damages. The relationship of master and servant must be shown to have subsisted at the time of the seduction, for, if it appears that the relationship was contracted afterwards, there is no consequential injury, and no ground of action (g). Very slight evidence of actual service, such as milking cows, making tea, nursing children, will suffice to prove the fact of actual service (h). And where a daughter is shown to have been living with her father at the time of the seduction, forming part of his family, and liable to his control and command, service will be presumed, and proof of acts of actual service will be unnecessary (i). It is not necessary to produce the seduced daughter as a witness at the trial, if the seduction can be proved aliunde, though the withholding of her testimony may afford a strong topic of observation to the jury (k).

(z) Tindal, C. J., *Grinnell v. Wells*, 7 M. & Gr. 1040.

(a) 15 & 16 Vict. c. 76, Sched. B., 38, 39.

(b) *Holloway v. Abel*, 7 C. & P. 528. *Torrence v. Gibbins*, 5 Q. B. 297.

(c) *Eager v. Grimwood*, 1 Exch. 61; 16 Law, J., Exch. 236.

(d) *Boyle v. Brandon*, 13 M. & W. 738; 14 Law, J., Exch. 344.

(e) *Davies v. Williams*, 10 Q. B. 728.

(f) *Reddie v. Scoot*, Peake, 316.

(g) *Davies v. Williams*, 10 Q. B. 729.

(h) Buller, J., *Bennett v. Alcott*, 2 T. R. 168; ante, p. 698.

(i) *Maunder v. Venn*, M. & M. 323.

Jones v. Brown, 1 Esp. 217. *Fores v. Wilson*, Peake, 77. *Coleridge, J., Torrence v. Gibbins*, 5 Q. B. 300.

(k) *Farmer v. Joseph*, Holt, 452.

Of the damages recoverable in actions for seduction.—In estimating the damages to be given to a father who sues for compensation for the loss of service of his daughter from seduction, the jury are not confined to the consideration of the mere loss of service, but may give damages for the distress and anxiety of mind which the parent has sustained in being deprived of the society and comfort of his child, and by the dishonour which he receives; “although it is difficult,” observes Lord Ellenborough, “to conceive upon what legal principles the damages can be extended ultra the injury arising from the loss of service” (l). The jury also must take into consideration the situation in life and circumstances of the parties, and say what they think, under all the circumstances of the case, is a reasonable compensation to be given to the injured parent (m). “In point of form,” observes Lord Eldon, “the action only purports to give a recompense for loss of service; but we cannot shut our eyes to the fact, that it is an action brought by a parent for an injury to her child, and the jury may take into their consideration all that she can feel from the nature of the loss. They may look upon her as a parent losing the comfort as well as the service of her daughter, in whose virtue she can feel no consolation; and as the parent of other children whose morals may be corrupted by her example” (n).

Evidence in aggravation of damages—Proof that the defendant made his advances to the daughter under the guise of matrimony.—Evidence is inadmissible to show that the defendant accomplished the seduction through the medium of a promise of marriage, for the purpose of enhancing the damages, as the breach of promise constitutes a distinct cause of action, in respect of which damages are recoverable by the daughter. “But you may ask,” observes Lord Ellenborough, “whether the defendant paid his addresses to her in an honourable way” (o). “The jury do right,” observes Wilmut, C. J., “in a case where it was proved that the seducer had made his advances under the guise of matrimony, in giving liberal damages; and if the party seduced brings another action against the defendant for the breach of promise of marriage, so much the better. If much greater damages had been given, we should not have been dissatisfied therewith, the plaintiff having received this insult in his own house, where he had civilly received the defendant, and permitted him to pay his addresses to to his daughter” (p).

If, in the course of the trial, a promise of marriage is inadvertently proved, the jury must be told to exclude the injury resulting to the

(l) *Irwin v. Dearman*, 11 East. 23.

(m) *Andrews v. Askey*, 8 C. & P. 9.

Southernwood v. Ramsden, cited ib. 9.

(n) *Bedford v. McKowl*, 3 Esp. 120.

(o) *Dodd v. Norris*, 3 Campb. 520.

Elliott v. Nicklin, 5 Pr. 641.

(p) *Tullidge v. Wade*, 3 Wils. 18.

seduced girl from the breach of promise of marriage from their consideration, and leave it quite out of the question in determining the amount of the damages to be recovered by the father and master for the loss of service (q).

Evidence in mitigation of damages.—The loss that the father sustains by the seduction of his daughter depends, to a very great extent, upon the value of her previous character. *Prima facie*, it is to be presumed that she was a moral and virtuous girl at the time of her seduction, and contributed to the domestic happiness of her parents, but it is competent to the defendant to show that this was not the case, in order to diminish the loss and reduce the damages; and if evidence is given to impeach the character of the girl, it may be met and rebutted by evidence on the part of the plaintiff of her previous good character. The defendant may call witnesses to prove particular acts of sexual intercourse between the plaintiff's daughter and those witnesses prior to the period of the seduction, either for the purpose of reducing the damages (r) or for the purpose of showing that the defendant is not the father of the child, and, therefore, that his sexual intercourse with the daughter did not occasion the loss of service of which the plaintiff complains (s). It may be shown that the seduced girl, prior to the seduction, was in the habit of keeping loose company or of giving utterance to loose language and immodest remarks; but before witnesses can be called to prove the nature of the language or of the remarks, she must be pointedly and expressly asked in her cross-examination, whether she ever used the particular language or the precise remarks intended to be given in evidence against her (t).

Where the whole of the cross-examination in an action for seduction went to show that the party seduced had conducted herself immodestly and kept improper company, witnesses were allowed to be called to prove her general good character and modest deportment, and the general respectability of the family (u). But where the daughter was cross-examined to show that she had submitted herself to the defendant's embraces under circumstances of extreme indelicacy, and had been guilty of great levity of conduct, Lord Ellenborough refused to allow witnesses to be called to the general character of the daughter, saying she had had ample opportunity of setting her conduct right in the course of her re-examination (x). And where evidence was given on the part of the defendant to prove that the girl, previous to her acquaintance with him, had had a child by another man, Lord Ellenborough restricted the

(q) *Tullidge v. Wade*, 3 Wils. 18.

(r) *Ferry v. Watkins*, 7 C. & P. 308.

(s) *Eager v. Grimwood*, 1 Exch. 61;
16 Law, J., Exch. 236.

(t) *Carpenter v. Wall*, 11 Ad. & E. 803.

(u) *Bale v. Hill*, 1 C. & P. 100.

(x) *Dodd v. Norris*, 3 Campb. 518.

evidence tendered by the plaintiff in reply thereto to disproving the specific breach of chastity alleged by the defendant, and would not allow him to give general evidence of his daughter's good character for chastity and respectability (y).

Damages recoverable in actions for inducing or persuading wives, servants, or workmen, to abandon their duties or neglect the fulfilment of a contract.—

If a servant or contractor is induced not to perform the work or contract which he has undertaken to perform, through the malicious persuasion of the defendant, damages far beyond the value of the subject-matter of the contract may be recoverable from the wrongdoer (z). The measure of damages is not to be confined to the loss of the services of the servants who were actually enticed away, but the jury are justified in giving ample compensation for all the damage resulting from the wrongful act (a). Where the plaintiff alleged that his wife, having left him and lived apart from him, during which time a considerable fortune was left to her separate use, and she, being willing to return to the plaintiff, the defendant unlawfully persuaded her to continue to live away from the plaintiff, whereby he lost the assistance of his wife in his domestic affairs and the advantage of her fortune, 8000*l.* damages were recovered for the wrong done (b).

(y) *Bamfield v. Massey*, 1 Campb. 460.

(z) *Crompton, J., Lumley v. Gye*, 2 Ell. & Bl. 230; 22 Law, J., Q. B. 463.

(a) *Gunter v. Astor*, 4 Moore, 15.

(b) *Winsmore v. Greenbank*, Willes, 580.

CHAPTER XIX.

OF ACTIONS EX DELICTO GENERALLY—PARTIES THERETO— NON-JOINDER AND MIS-JOINDER OF PARTIES.

SECTION I.—Parties to be made plaintiffs in actions ex delicto.—Parties to be made plaintiffs in actions of tort founded on contract—Remedies of tenants-in-common and joint-tenants against each other—Rights of the survivor—Trustee and cestui que trust—Public boards, corporations, and joint-stock companies—Principal and agent, master and servant—Husband and wife—Actions by married women after a judicial separation—Actions by heirs-at-law, devisees, and personal representatives—Actions by administrators, assignees of bankrupts and insolvents—Number of the plaintiffs—Joint and separate causes of action.

SECTION II.—Parties to be made defend-

ants in actions ex delicto.—Actionable wrongs and injuries not actionable—Liabilities of tenants-in-common, corporate bodies, public boards, public officers, trustees and commissioners, master and servant, employer and contractor, husband and wife, infants—Subsequent ratification and adoption of a wrongful act—Liabilities of executors or administrators for wrongs committed by their testator or intestate, and for their own wrongful acts—Liabilities of assignees in bankruptcy and insolvency—Number of the defendants.

SECTION III.—Of the non-joinder and mis-joinder of parties.—Plea of non-joinder in abatement—Amendment before and at the trial.

SECTION I.

OF ACTIONS EX DELICTO AND THE PARTIES TO BE MADE PLAINTIFFS IN SUCH ACTIONS.

THE parties to be made plaintiffs in particular actions have already been considered—such as actions for wrongful acts interfering with the beneficial use and employment of landed property (ante, p. 10), or obstructing the enjoyment of easements, profits à prendre, and incorporeal rights over land (ante, pp. 63–65), actions for nuisances (ante, pp. 103, 104), injuries from fire (ante, p. 133), trespasses upon lands and tenements (ante, pp. 157–159), trespass and conversion of chattels (ante, pp. 220–223), negligence (ante, p. 255), detention and loss of chattels by bailees (ante, pp. 290–292), and carriers

(ante, pp. 384–386), actions for unlawful and excessive distresses (ante, p. 380), actions for assault and battery and wrongful imprisonment (ante, pp. 415, 416), actions against sheriffs (ante, p. 487), actions for libel and slander (ante, pp. 609, 610), actions for fraudulent misrepresentation and deceit (ante, pp. 654–657).

Parties to be made plaintiffs in actions of tort founded on contract.—Where a contract creates a duty, the neglect to perform that duty, as well as the negligent performance of it, is a ground of action upon a tort. Both the non-feazance and the mis-feazance constitute a wrongful act, for which the remedy is by action of contract or of tort, at the option of the party injured (c). Whenever the goods and chattels or materials of an employer are placed in the hands of a workman to be worked upon, any loss or injury to the chattels and materials, from the negligent execution of the work, forms a ground of action upon a tort as well as upon a contract. So, if I deliver goods to a carrier to be carried for hire, and the goods are lost or injured through the negligent performance of the work of carrying, an action of contract or of tort is maintainable against the carrier, at the option of the owner of the goods (d).

But it is said to be a rule of law that, wherever a wrong is founded purely upon a breach of contract, the plaintiff who sues in respect thereof must be either a party or privy to the contract, in order to establish a duty on the part of the defendant towards the plaintiff, and show a wrong done to the latter (e). Thus, where the defendant had contracted with the Postmaster General to supply a certain number of stage-coaches and keep them in good working order and condition, and fit for the road, and, through his neglect to do the necessary repairs, one of the coaches broke down and injured the coachman, it was held that the coachman could not maintain an action against the coachmaker, as the negligence and breach of duty on the part of the coachmaker were grounded purely upon a breach of contract, and the coachman was neither a party nor privy to that contract (f). But every person who exercises an employment is bound, as we have seen, to take especial care to do his work so as not to injure another by the negligent performance of that work, whether what he does is done merely to please himself, or by virtue of a contract made with another (ante, pp. 256–259). If materials furnished to a workman to be manufactured or worked upon are injured by the negligent execution of the work, the owner of the materials, or the person who furnished them to the workman, is the party

(c) *Boorman v. Brown*, 3 Q. B. 526; 11 Cl. & Fin. 1.

(d) *Coggs v. Bernard*, Smith's Leading Cas. 92, 93.

(e) *Tollit v. Sherstone*, 5 M. & W. 288.

(f) *Winterbottom v. Wright*, 10 M. & W. 115. *Blakemore v. Brist. & Exeter Rail. Co.*, 8 Ell. & Bl. 1049; 27 Law, J., Q. B. 107.

to be made plaintiff in an action for the neglect of duty; but if the person or the property of a stranger is injured by the negligent execution of the work, the injured stranger is the party to be made plaintiff (ante, pp. 258-260).

Every person who enters upon the performance of the work of carrying merchandize or passengers, is bound to exercise due and proper care and skill in the performance of the work, whether the work is done under a contract or gratuitously, and every person who has been injured by the negligent performance of the work of carrying is entitled, as we have seen, to an action against the carrier, although he is no party to the contract under which the work was done (g).

There are other cases also, in which a third person, though not a party to a contract, may sue for the damage sustained if it be broken. As, for example, if an apothecary administers improper medicines to his patient, or a surgeon unskilfully treats him, and thereby injures his health, the apothecary and the surgeon will be liable to the patient, although the father or friend of the patient may have been the contracting party with the apothecary or surgeon: for, though no such contract had been made, the apothecary, if he gave improper medicines, or the surgeon, if he took him as a patient and unskilfully treated him, would be liable to an action for a misfeasance (h).

If a mason contract to erect a bridge or other work in a publick road, which he constructs, but not according to the contract, and the defects of which are a nuisance to the highway, he may be responsible for it to a third person who is injured by the defective construction, and he cannot be saved from the consequences of his illegal act in committing the nuisance on the highway, by showing that he was also guilty of a breach of contract, and responsible for it. And it may be the same when any one delivers to another, without notice, an instrument in its nature dangerous, as a loaded gun, which he himself has loaded, and that other person to whom it is delivered is injured thereby; or if he negligently places it in an improper situation, easily accessible to a third person, who sustains damage from it, not supposing that a loaded gun would have been placed in such a spot (i).

Whenever an action of tort is founded upon a contract, it proceeds upon the assumption that the contract is good in law, and can be enforced by action; if, therefore, the contract is verbal when by law it is required

(g) *Collett v. Lond. & North-West. Rail. Co. Marshall v. York, &c.*, ante, p. 336.

(h) *Parke, B., Longmeid v. Holliday*, 6 Exch. 787. *Gladwell v. Steggall*, 8 Sc.

67; 5 Bing. N. C. 733.

(i) *Parke, B., Longmeid v. Holliday*, 6 Exch. 787. *Dixon v. Bell*, 5 M. & S. 198.

to be in writing, no duty is created by it, and an action founded upon such contract is not maintainable (*k*).

Of the remedies which tenants-in-common and joint-tenants have against each other.—If two several owners of houses have a river or stream in common, and one of them corrupts it, the other shall have an action against him for damages. And whenever one tenant-in-common misuses the common property, or commits waste, he is responsible to his co-tenant in common for the injury he has done. If there be two tenants-in-common of a wood, and one of them leases his part to the other, who cuts down young timber-trees and does waste, he shall be punished for a moiety of the waste, and the lessor shall recover a moiety of the place wasted: but one tenant-in-common cannot maintain an action in the nature of waste against the other, for cutting down trees of a proper age and proper growth, for this is no injury to the inheritance; but he is entitled, in an action of account, to recover a moiety of the value of the tree (*l*).

By the common law, joint-tenants and tenants-in-common had no remedy against each other where one alone received the whole profits of the estate; for he could not be charged as bailiff or receiver to his companion, unless he actually made him so; but by 4 & 5 Anne, c. 16, it is provided, that joint-tenants and tenants-in-common, and their executors and administrators, may have an account against the others as bailiffs, for receiving more than comes to their just share or proportion.

Rights of the survivor of two joint-tenants or tenants-in-common.—In case of the death of two joint-tenants of lands or chattels, the whole interest in the property passes, as we have seen, to the survivor; but in the case of the death of one of two tenants-in-common of real property, the share and interest of the deceased passes to his heir-at-law, and in the case of a tenancy-in-common of chattels, to the personal representatives of the deceased. But in the case of the death of one of two tenants-in-common of a patent, the right of action for infringement of the patent in the lifetime of the deceased tenant-in-common survives to the other, and the latter is consequently entitled to recover the whole of the damages (*m*).

Trustee and cestui que trust.—In the case of a permanent injury to real property in the occupation of a tenant to whom it has been demised by a cestui que trust, the trustee in whom the legal estate in reversion is vested is the proper party to sue for the injury to the reversion, and not the cestui que trust, who has only an equitable interest. "The cestui que trust," observes Tindal, C. J., "has no interest in law; if he enters his

(*k*) *Carrington v. Roots*, 2 M. & W. 255.

(*l*) *Martyn v. Kendwells*, 8 T. R. 145.

(*m*) *Smith v. Lond. & North-West. Rail. Co.*, 2 Ell. & Bl. 69.

possession is considered the possession of the trustee, and any disposition made by him and adopted by the trustee is considered the disposition of the trustee" (n).

Trustees of public works, boards of health, and corporate bodies are entitled, as we have seen, to sue either in their corporate name or in the name of their clerk, treasurer, or some public officer, according to the provisions of special Acts of Parliament, clothing them with particular statutory powers (ante, p. 563).

Owners and bailees of goods.—We have seen that many persons who have only a special property in goods may maintain an action for damage done to them, or for the conversion, detention, or loss of them (ante, pp. 220–223, 290–292): such as a carrier, who is the mere instrument of conveyance, or a workman, to whom goods have been sent to be repaired or worked upon, or a warehouse-keeper, who has them for safe custody, or an auctioneer or shopkeeper, to whom they have been sent to sell (o), or the master of a vessel, or of a canal-boat, who is intrusted with the possession and management of the vessel or boat, and its tackle and furniture (p), and many others to whom goods have been delivered for a special purpose, and who do not pretend to any absolute property in them (q).

Master and servant.—The master is entitled, as we have seen, to maintain an action for damages for a personal injury to his servant, whereby he has been deprived of the services of the latter, and for expenses incurred by him in curing his servant's personal injuries, and recovering the benefit of his services. "Courts of justice have allowed all the circumstances of the case to be taken into consideration with a view to the calculation of the damages" (r). The master may claim, and will be entitled to recover, damages not only for the loss of the services of his servant up to the time of the commencement of the action, but, if the servant continues disabled, down to the time when it appears by the evidence that the disability may be expected to cease (s). A parent whose child was, before the injury it sustained, capable of performing acts of service, may, as we have seen, maintain an action for damages for the loss of the services of the child, if he can prove that the child was living with him, and rendered him some sort of personal service (t). The servant himself, also, is entitled to an action for the damage he has sustained

(n) *Vallance v. Savage*, 7 Bing. 599.

(o) *Williams v. Millington*, 1 H. Bl. 84.
Colwell v. Reeves, 2 Campb. 576.

(p) *Pitts v. Gance*, 1 Salk. 10. *Moore v. Robinson*, 2 B. & Ad. 817.

(q) *Martini v. Coles*, 1 M. & S. 147.

(r) *Abbott, C. J., Hall v. Hollander*,

4 B. & C. 663; ante, pp. 696, 697.

(s) *Hodsoll v. Stallebrass*, 11 Ad. & E. 301; post, ch. 21, PROSPECTIVE DAMAGES.

(t) Ante, pp. 696, 697. *Hall v. Hollander*, 4 B. & C. 662.

by the tortious act: for loss of wages, bodily pain, and the expenses he has incurred in procuring medical advice and medicine, food, and lodging, which would otherwise have been provided for him by his master. The servant himself who sustains bodily pain and anguish, is the only party entitled to damages in respect thereof (*u*).

Husband and wife.—If a man marries a woman seized in fee of certain lands and tenements, he gains a freehold interest therein in right of his wife; and if he is the actual occupier of them, he is, of course, entitled to sue for all damage done to his beneficial occupation and enjoyment of the property. If the wife, on her marriage, was possessed of chattels real, such as leasehold interests, estates by statute merchant, statute staple, &c. the husband will be entitled to them as a gift in law, and may, during the marriage, deal with them as the absolute owner of them; but if he fails to make any transfer or disposition of them in his lifetime, and his wife survives him, she will then take them by survivorship. The husband cannot devise them, but he may transfer them by deed (*x*). If the wife's estates have, prior to the marriage, been conveyed to trustees, the husband will then have no legal interest in the property, and no right to maintain an action for any damage that may be done to it.

If the husband, having an interest in the wife's real estate, grants leases thereof during their joint lives, reserving rent to himself and making his wife no party to the lease, then, as the reversion is in the husband, he is the proper party to sue for damage done to his reversionary estate (*y*), and for double value under 4 Geo. 2, c. 28, for holding over by tenants after notice to quit (*z*). If a feme sole hath a right to have common for life, and she marries, and the husband is hindered in his enjoyment of the right of common, he alone may have an action for damages (*a*).

Joinder of husband and wife as plaintiffs.—Actions for the conversion of the goods of a feme covert before her marriage, and for wrongs done to her before marriage, should be brought by the husband and wife jointly, as the chose in action in case of the death of the husband would survive to the wife; and if the wife sues alone on such chose in action, she will be entitled to damages, unless the nonjoinder of the husband is pleaded in abatement (*b*). The marriage operates, as we have seen, as an absolute gift in law to the husband of all the goods and chattels and personal property of the wife. The husband, therefore, after the marriage, may demand possession of the chattels of the wife in the hands of a stranger;

(*u*) *Gladwell v. Steggall*, 5 Bing. N. C. 738. 18 Law, J., Exch. 453; ante, pp. 157–159.

(*x*) BAC. ABR. BARON AND FEME, C.

(*y*) *Wallis v. Harrison*, 5 M. & W. 142.

(*z*) *Harcourt v. Wyman*, 3 Exch. 824;

(*a*) *Baker v. —*, 2 Bulstr. 14.

(*b*) *Milner v. Milnes*, 3 T. R. 627.

Morgan v. Cubitt, 3 Exch. 612. *Dalton v. Mid. Count. Rail. Co.*, 13 C. B. 474.

and if the latter has no lien upon them or right to detain them, and refuses or neglects to deliver them up to the husband, the latter may maintain an action for the detention or conversion of them without joining the wife, as the tort is to the husband: but if the action is brought for the conversion of deeds and securities relating to property and choses in action which would survive to the wife in case of the death of the husband, the wife would be properly joined with the husband for conformity (c).

So absolute is the husband's right to all chattels and personal property which come to his wife's hands after marriage, that if the wife buys wearing apparel out of money settled to her separate use, and received by her from her trustees, such wearing apparel vests by law in the husband as the legal owner thereof; and the same rule prevails with regard to money and all kinds of personalty, as soon as it is placed by the trustees in the hands of the wife in the execution of the trusts (d). In actions for the recovery of damages for a personal wrong or violence done to the wife, where the action would survive to her in the case of the death of her husband, the wife ought to be joined as a plaintiff, although the declaration sets forth and claims some special damage accruing to the husband; but where there is no injury to the person of the wife, and the action would not survive to her, the wife ought not to be joined, she having no legal interest in the damages to be recovered (e). The husband, for example, is alone entitled to sue for the loss of the services of his wife through the tortious act of the defendant, and for the expenses he has incurred in doctors and nurses in curing her of injuries resulting from an assault upon her by the defendant; but when damages are sought to be recovered for the bodily pain suffered by the wife from personal violence, or for injury to her personal feelings from slanderous attacks upon her, the wife must be a plaintiff in the action, and the husband be joined with her for conformity (f).

By the old law, therefore, it was often necessary to bring separate actions for the recovery of the entire damage resulting from an injury to the person of the wife, in one of which the husband alone was made plaintiff, and in the other the wife was joined for conformity; but now by the Common Law Procedure Act, 1852, s. 40, it is enacted, that in any action brought by a man and his wife for an injury done to the wife, in respect of which she is necessarily joined as co-plaintiff, it shall be lawful for the husband to add thereto claims in his own right, and separate actions brought in respect of such claims may be consolidated if the court

(c) *Ayling v. Whicher*, 6 Ad. & E. 259.

(d) *Carne v. Brice*, 7 M. & W. 183.
Bird v. Peagram, 13 C. B. 649.

(e) *Saville v. Sweeny*, 4 B. & Ad. 523.

(f) *Dengate v. Gardiner*, 4 M. & W. 6.

or a judge shall think fit; but it is provided that in the case of the death of either plaintiff such suit, so far only as relates to the causes of action, if any, which do not survive, shall abate.

If a defendant has been guilty of a fraudulent representation that a chattel is fit for use, knowing that it is not, and making the representation in order that the chattel may be used by the plaintiff's wife, and the wife uses it and is injured, both the husband and wife may be properly joined in an action for the deceit, but the wife cannot be joined with the husband where the action is founded merely on a breach of warranty without proof of wilful deceit (*g*). If a party professing to sue as the husband of an injured female is not in truth her husband, he has no right to maintain the action. It is a good plea in bar, therefore, to an action professing to be an action by husband and wife for an injury done to the wife, to plead that the female plaintiff is not the wife of the male plaintiff (*h*).

Where husband and wife were seized of a messuage for their joint lives and the life of the survivor, and all the estate and interest of the husband became vested in the defendant, who permitted waste during the lifetime of the husband, it was held that the wife, who survived her husband, could not maintain an action against the defendant in respect of such waste (*i*).

Actions by married women after a judicial separation.—When a married woman is living separate from her husband under a decree for a judicial separation, she is considered as a feme sole for the purpose of suing for damages for any wrong or injury that she may have sustained (*k*). But until a decree for a judicial separation has been obtained, she ought, although she is living apart from her husband, to sue in his name for any trespass that may have been committed in her dwelling-house (*l*).

Infants have a right to sue by guardian or prochein ami to recover damages for injuries done to their persons or property through the tortious act of another.

Heir-at-law, devisee, and personal representatives.—All causes of action in respect of injuries of a continuing nature to real property descend with the property to the heir-at-law on the death of the ancestor, or vest in the devisee, remainderman, or personal representative, in whom the legal estate in the land may be vested by deed, will, or administration (*m*).

The heir-at-law is the proper party to maintain an action for the

(*g*) *Longmeid v. Holliday*, 6 Exch. 761.

(*h*) *Chantler v. Lindsey*, 16 M. & W. 82.

(*i*) *Bacon v. Smith*, 1 Q. B. 345.

(*k*) 20 & 21 Vict. c. 85, s. 26; ante, p. 673.

(*l*) *Boggett v. Frier*, 11 East, 301.

(*m*) *Vivian v. Champion*, 2 Ld. Raym. 1126.

entire damage resulting from a nuisance of a continuing nature to land which comes into his possession by descent. Thus, where one John Rolf built a house so near to the house of Richard Rolf that the eaves of his said house did overhang the house of Richard, and pour water thereon, and afterwards both John and Richard died, and their respective houses descended to their respective sons and heirs-at-law, and the heir of Richard, on request made to him by the heir of John, did not reform the wrong, whereupon the latter brought an action against the heir of Richard, who did demur in law, it was adjudged that the action was maintainable, because the defendant did not on request reform the nuisance which his father had made, but suffered it to continue, to the prejudice and damage of the plaintiff, son and heir to him to whom the wrong was done (*n*).

So, where a nuisance erected on the land of a devisor in the lifetime of such devisor was continued afterwards in the time of the devisee, it was held that the devisee should have an action for it, for the continuance thereof is a new erecting of such nuisance (*o*). If the land or tenement is in the occupation of a tenant, the latter is, as we have seen, the proper party to sue for damages in respect of the immediate injury done to his possessory interest, and to his use and enjoyment of the property; and the heir must sue for the damage done to his reversionary estate (*ante*, pp. 103, 105, 157-159, 172).

When the reversionary interest of a deceased leaseholder, who has underlet the premises demised to him, becomes vested in his personal representatives, they are, of course, the proper parties to sue for damages in respect of permanent injuries to the property of a continuing nature, diminishing the value of their reversionary estate (*ante*, pp. 105, 158). When the damage done to real property was not of a continuing nature, but accrued wholly in the lifetime of the testator, the heir-at-law, devisee, or remainderman, could not sue in respect of it; neither could the personal representative, in consequence of the old maxim of the common law, *actio personalis moritur cum personâ*. Thus, if trespassers entered upon the land and cut down trees, or gathered, carried away, and sold growing crops and fruit; or set fire to buildings, and caused them to be utterly consumed, the heir could not sue, because the ultimate damage was sustained in the lifetime of the ancestor, and the personal representatives could not recover the damages that had been sustained, because they were personal to the deceased, and the remedy died with

(*n*) 2 Hen. 4, 13; 31 Ed. 3, Voucher, 272, cited in *Penruddock's case*, 5 Co. 101 a. *Gillon v. Boddington*, cited 5 B.

& C. 268.

(*o*) *Some v. Barwisch*, Cro. Jac. 231,

him (p). But by 3 & 4 Wm. 4, c. 42, s. 2, reciting that there was no remedy provided by law for injuries to the real estate of any person deceased, committed in his lifetime, it is enacted, that an action of trespass or case may be maintained by the executors or administrators of any person deceased for any injury to the real estate of such person, committed in his lifetime, for which an action might have been maintained by such person, so as such injury shall have been committed within six calendar months before the death of such deceased person, and provided such action shall be brought within one year after the death of such person.

On the death of an owner of goods and chattels in the hands of bailees and depositaries the right of property in the chattels vests in the personal representatives, and if the bailee has no lien upon them, or interest in them, or right to detain them as against the owner, the personal representatives may demand possession of them; and if the bailee refuses to deliver them he may be sued for the detention or conversion of the property (q). Being themselves the owners of the property on the death of the testator or intestate, they are the proper parties to sue in respect of trespasses committed by persons who take the goods out of their actual or constructive possession, or out of the custody of their servants or agents (r); but they cannot sue in respect of any detention or conversion of the property in the lifetime of the deceased owner, nor for a trespass in taking it away, by reason of the maxim *actio personalis moritur cum personâ*. To remedy this inconvenience, it was enacted by 4 Ed. 3, c. 7, that executors shall have actions for a trespass done to their testators in respect of the goods and chattels of the said testators carried away in their lifetime, and recover their damages in like manner as they whose executors they be should have had if they were in life. By 25 Ed. 3, c. 5, the benefit of this statute is extended to the executors of executors; and it has been held that administrators are within the equity of the statute. It has been held that an action is maintainable by executors upon this statute against a defendant for cutting down and carrying away a growing crop of wheat from the testator's land in his lifetime, because corn growing is a chattel; but that if the defendant had cut down the corn and let it lie, no action would have been maintainable by the executor; nor if the grass had been cut and carried away by the defendant, because the grass is part of the freehold (s).

As actions for personal wrongs die with the person, it follows that

(p) *Adam v. Bristol*, 2 Ad. & E. 389. pp. 220-223.
Raymond v. Fitch, 2 C. M. & R. 597. (r) *Adams v. Ocheverel*, Cro. Jac. 113.
 (q) *Hollis v. Smith*, 10 East, 292; ante, (s) *Emerson v. Emerson*, 1 Ventr. 187.

executors and administrators cannot maintain an action for a libel upon their deceased testator or intestate, or for an assault or false imprisonment, or any act of negligence or violence causing injury to the person, not ending in death. But if the declaration of the cause of action, though framed in tort, is in substance for a breach of contract which has damaged the personal estate of the testator, the action is maintainable, as the substance, and not the form, of the thing must be regarded. Thus, if a person contracts with a coach-proprietor to be safely and securely carried from one place to another, and through the negligence of the servant of such proprietor the coach be overturned, in consequence of which the passenger so contracting dislocates or fractures a limb, and owing to his confinement in procuring a cure his personal property sustained an injury; although he, during his lifetime, might sue the proprietor in assumpsit or tort, still his representative may after his death maintain an action on the contract to carry him safely, and recover damages for the injury which has accrued to his personal estate from the breach thereof. Where the plaintiff suing as administrator set forth in his declaration that the defendant was employed by the intestate in his lifetime to act as his attorney to investigate the title to an estate to be conveyed to such intestate as purchaser, that the defendant entered upon the employment, but neglected to investigate the title, and caused the intestate to accept a defective title by representing it to be a good title, showing special damage to the personal estate, it was held that the action was clearly maintainable, as the intestate in his lifetime might have sued in contract as well as in tort (*t*). But as regards personal injuries unconnected with contract causing the death of the party injured, it has been enacted, as we have seen by the statute 9 & 10 Vict. c. 93 (*ante*, p. 254), that whenever the death of a person has been occasioned by any wrongful act, or by neglect or default, such as if death had not ensued would have entitled the injured party to maintain an action and recover damages in respect thereof, then the person who would have been liable if death had not ensued shall be liable to an action for damages, to be brought in the name of the executor or administrator of the person deceased.

Actions by administrators — Title by relation. — An action is maintainable by an administrator for a wrongful seizure by the defendant of the intestate's goods made between the death of the intestate and the grant of the letters of administration (*u*); and an action is maintainable in respect of goods wrongfully sold after the death of the intestate, and before the grant of the letters of administration (*x*).

(*t*) *Knights v. Quarles*, 4 Moore, 541. 777.

(*u*) *Tharpe v. Stallwood*, 5 M. & Gr.

(*x*) *Foster v. Bates*, 12 M. & W. 226.

Assignees of bankrupts with leave of the Court of Bankruptcy, and not otherwise, may commence and prosecute any action or suit which the bankrupt might have prosecuted, and the costs they are put to may be allowed out of the bankrupt's estate (*y*). In all actions by and against assignees of a bankrupt, the character in which the plaintiff or defendant is stated on the record to sue or be sued is not in any case to be considered in issue, unless it is specially denied (*z*).

Transfer of rights and liabilities ex delicto to assignees of bankrupts and insolvents.—We have already seen that all the real and personal estate and effects (except copyhold) of bankrupts and insolvents are vested in the assignees (*ante*, pp. 204–207). The assignees, therefore, are the proper parties to maintain an action for injuries done to real or personal property, which has become vested in them by reason of the bankruptcy or insolvency (*a*); but they cannot maintain an action for injuries to the person of the bankrupt or insolvent. They cannot sue, for example, for damages for a libel upon him, although the injury occasioned thereby to the man's reputation may have been the sole cause of his bankruptcy or insolvency; nor can they sue for damages for an assault upon the bankrupt or insolvent, or for the seduction of his servant (*b*); and the same may be said of some personal injuries arising out of breaches of contracts, such as contracts to cure or to marry; and if in these cases a consequential damage to the personal estate follows from the injury to the person that may be so dependent upon, and inseparable from the personal injury, which is the primary cause of action, that no right to maintain a separate action in respect of such consequential damage will pass to the assignees. But where the primary and substantial cause of action is not, properly speaking, personal to the bankrupt, but the injury to the person is the consequence of an injury to the personal estate, the injury to the personal estate is the primary and substantial cause of action, and such right of action will pass to the assignees as part of the personal estate (*c*).

Where a plaintiff who had become bankrupt complained that the defendant had seized his goods under a false and pretended claim of right; that he was thereby much annoyed and prejudiced in his business, and believed to be insolvent; and that by means of the premises certain of his lodgers, being induced to believe that he was in embarrassed circumstances, and that the defendants were entitled to seize the goods for a debt, quitted the house, and the declaration then claimed special damages, it was held, that as the jury were entitled upon the declaration as it stood

(*y*) 12 & 13 Vict. c. 106, s. 153.

(*z*) Reg. Gen. Hil. T. 16 Vict., 1 El.
& Bl. App. lxxix.

(*a*) *Mitchell v. Hughes*, 0 Bing. 680.

(*b*) *Howard v. Crowther*, 8 M. & W. 601.

(*c*) *Drake v. Beckham*, 11 M. & W. 319.

to give vindictive damages for the personal injury far beyond the mere value of the goods, a plea of the bankruptcy of the plaintiff, and of the transfer of the causes of action to the assignees, afforded no answer to the plaintiff's claim (*d*). "There is no doubt," observes Lord Campbell, "that a cause of action which is exclusively confined to injury to property will pass to the assignees, but there is a difficulty when there is a mixed case of injury to the person and injury to property. It may be that in such a case the law will give an action to the bankrupt for the personal injury sustained by him, and an action to the assignees for the injury done to the property" (*e*).

If the bankrupt, notwithstanding his bankruptcy, continues in the possession and occupation of land which has been demised to him, he may maintain an action for trespasses or injuries done to the land, if the assignees do not interpose and take the lease. But if he goes away and abandons the possession of the premises, he has no right of action (*f*), unless he returns and resumes possession with the assent of the assignees or the landlord, before any other person has entered and become the occupier of the property (*g*). If the assignees think fit to take to the lease, they are then the proper parties to sue for any trespass or injury committed upon the demised premises (*h*).

Of the number of the plaintiffs in actions ex delicto—Joint and separate rights of action.—Joint-tenants of lands, and all persons having a joint interest in property, real or personal, should be joined as plaintiffs in actions for damages for injuries done to their joint property (ante, pp. 158, 159, 222, 223, 255, 256, 292). Tenants-in-common should, as we have seen, be joined as plaintiffs in actions for injuries to their common property, such as trespasses upon their land, nuisances to their estates, and for all trespasses and injuries to their common property; because, though their estates are several, yet the damages survive to all, and it would be unreasonable for them to bring several actions for one single injury (*i*). If a nuisance to the land of two tenants-in-common be continued after the death of one of them, the devisee of the deceased tenant-in-common should join the survivor in an action for such nuisance (*k*).

Assignees in bankruptcy and insolvency taking a joint interest as trustees of a bankrupt's or insolvent's estate should all be joined as plaintiffs in an action brought by them in their representative character in respect of injuries to such estate (*l*).

(*d*) *Brewer v. Drew*, 11 M. & W. 625.

(*e*) *Rogers v. Spence*, 12 Cl. & Fin. 720.

(*f*) *Clark v. Calvert*, 8 Taunt. 752.

(*g*) *Topham v. Dent*, 6 Bing. 515.

(*h*) *Hancock v. Caffyn*, 8 Bing. 367.

(*i*) Ante, pp. 105, 106, 158, 159. *Hare v. Celey*, Cro. Eliz. 143. *Some v. Barwisk*, Cro. Jac. 281.

(*k*) Bac. Abr. *Joint Tenants*, &c. K.

(*l*) *Snelgrove v. Hart*, 2 Stark. 424. *Jones v. Smith*, 1 Exch. 881.

But parties cannot properly be joined as plaintiffs in an action where the wrong done to one is no wrong to the other, as in the case of false imprisonment, assault, and personal injuries (*m*). If slander is published concerning two partners, containing imputations injurious to them in their trade and affecting their joint interests, they may sue jointly for damages (*n*).

Provision is made, as we shall presently see (post, s. 3) by the Common Law Procedure Act, 1852, for amending a non-joinder or mis-joinder of plaintiffs' either before or at the trial, upon such terms as the court or a judge may think proper.

By the bill which has just been brought into Parliament, intituled "An Act for the further Amendment of the Process, Practice, and Mode of Pleading in and Enlarging the Jurisdiction of the Superior Courts of Common Law at Westminster," it is provided, that the joinder of too many plaintiffs shall not be fatal, but every action may be brought in the name of all the persons in whom the legal right may be supposed to exist; and judgment may be given in favour of the plaintiffs by whom the action is brought, or of one or more of them, or, in case of any question of mis-joinder being raised, then in favour of such one or more of them as shall be adjudged by the court to be entitled to recover: Provided always, that the defendant, though unsuccessful, shall be entitled to his costs occasioned by joining any person or persons in whose favour judgment is not given, unless otherwise ordered by the court or a judge. But no other action is (s. 44) to be brought against the defendant by any person so joined as plaintiff in respect of the same cause of action.

SECTION II.

OF ACTIONS EX DELICTO AND THE PARTIES TO BE MADE DEFENDANTS IN SUCH ACTIONS.

Actionable wrongs, and injuries not actionable.—Wherever facts and circumstances can be shown to exist which create a duty on the part of the defendant towards the plaintiff, and there has been a breach of that

(*m*) *Barratt v. Collins*, 10 Moore, 451; ante, pp. 415, 416.

(*n*) *Le Fanu v. Malcolmson*, 1 H. L. C. 637; ante, p. 610.

duty, and a consequent damage to the plaintiff, an action for damages is maintainable. "The compelling men and bodies of men," observes Lord Brougham, "to exercise faculties which they have received from heaven, is one of the most ordinary acts of legislative, of executive, and of judicial power. And it is fit that bishops and priests should sometimes be made to learn a lesson of obedience to the tribunals which have been appointed over them, and should be compelled to make reparation to those whom their breach of a plain duty has injured. If several are jointly bound to perform the duty, they are liable jointly and severally for the failure or refusal to perform it; and if it is a duty which the majority of the number is bound to perform, those who by their refusal prevent the greater number from concurring are answerable to the party injured" (o).

Whenever a plaintiff establishes some proprietary right or title in himself, which has been weakened or destroyed by the wrongful act of the defendant, an action for damages is, as we have seen, maintainable, though no actual pecuniary damage can be proved to have been sustained. Thus, a man who is entitled to have water flow through his land may, as we have seen, maintain an action for substantial damages for the diversion of the water, though he has not used and does not want to use the water (ante, pp. 1, 2, 14).

If facts are proved showing it to be the duty of a joint-stock company to register the plaintiff as a shareholder, and grant him a certificate of proprietorship of shares in the company, the company will be responsible in damages for neglecting their duty in that behalf, though no actual pecuniary damage is proved to have been sustained by the plaintiff (p). But in all cases it is essential to set forth in the declaration (q), and prove at the trial, the facts creating and imposing on the defendant the duty alleged to have been neglected.

We have already seen that the owners and occupiers of land are not bound to fence off dangerous excavations on their land situate more than seventy-five feet from a public highway. Where, therefore, the defendants were owners of waste land which was bounded by two highways, and the defendants worked a quarry in the waste, and the plaintiff not knowing of the quarry passed over the waste in the dark to get from one road to the other and fell into the pit, it was held that as there was no default in the defendants they were not responsible in damages (r).

In a recent action for a malicious prosecution it appeared that the defendant had sued the plaintiff in the County Court, who pleaded a set-

(o) *Ld. Brougham, Ferguson v. Earl Kinnoul*, 9 Cl. & Fin. 305.

(p) *Catchpole v. Ambergate, &c. Rail. Co.*, 1 Ell. & Bl. 120; 22 Law, J., Q. B. 85:

(q) *Post*, ch. 20, s. 1.

(r) *Hounsell v. Smith*, 8 W. R. C. P. 277; ante, pp. 81-84.

off, and the defendant, in order to get rid of the set-off, forged a receipt of the plaintiff's for a sum of money, and swore before the county-court judge that the handwriting to that receipt was the handwriting of the plaintiff. The plaintiff denied it, and the county-court judge, believing the plaintiff to have been guilty of perjury, committed him for trial, and bound over the defendant to prosecute. The defendant proceeded to the assizes, went before the grand jury and procured a bill of indictment to be found against the plaintiff, and stuck to the charge at the trial, and endeavoured to maintain it by perjured evidence, but the plaintiff was acquitted. The plaintiff then brought an action against the defendant for a malicious prosecution, and having satisfied a jury that the defendant preferred the charge with the knowledge of its falsehood, recovered 200*l.* damages; but it was held by the Court of Common Pleas, Willes, J., dissentiente, that the action was not maintainable, as the prosecution had been instituted by order of the judge of the County Court, who had set the criminal law in motion, and not the defendant. "Although," observes Williams, J., "the defendant led the county-court judge into the belief that the plaintiff, who spoke the truth, was swearing falsely, and thus caused the prosecution to be instituted, I am of opinion that this is only a remote cause, and not sufficiently proximate to make the defendant civilly responsible for it. Suppose a county-court judge directed some other person to be the prosecutor, and he had given evidence at the trial, it could hardly have been contended that this action would have been maintainable, for it would be nothing short of saying that an action will lie against a defendant for having committed perjury, whereby the plaintiff has sustained damage. No such action is maintainable, for if it were, cases must be every day occurring." Willes, J., however, was of opinion that the action was maintainable, because the defendant persisted to the last in the false charge, having no reasonable or probable cause for the charge, but preferring it with knowledge of its falsehood, and endeavouring at the trial to maintain it with further and perjured evidence. "But for the order of the county-court judge," he observes, "the action would, beyond all doubt, have been maintainable, and then that order ought not to aid the defendant: first, because it was occasioned by his own contrivance and wrong; and, secondly, because as a judicial act it is void, having been obtained by fraud of the court" (s).

It is lamentable to think that so grievous a wrong should be without a remedy; although the defendant was compelled to prosecute, there was no compulsion upon him to persist in a false charge. He might have discharged his recognizances by appearing and telling the truth. "It is

(s) *Fitz John v. Mackinder*, 8 W. R. 341; too recently reported to be introduced, ante, p. 438.

supposed," observes Lord Denman, "that a charge cannot be preferred before a grand jury maliciously, if the party be bound to prefer it, though the recognizance be obtained in consequence of his malicious proceeding. I have not the smallest doubt that a recognizance so obtained does not justify the party, or prevent his subsequent conduct from being malicious." "If an unwilling party," further observes Littledale, J., "were bound over by recognizance to prosecute, the recognizance would furnish an answer for this reason only, that in such a case the plaintiff could not prove that the defendant was actuated by a malicious motive" (t).

We have already seen that if an execution-creditor, or his attorney, directs a sheriff to seize particular goods as goods of the execution-debtor, and the sheriff seizes them, and in so doing commits a trespass, and has to pay damages, he is entitled to compensation from the party giving him the direction (ante, pp. 416, 418, 641, 642); but it has been held that a mere indication of the defendant's place of residence indorsed on the back of a writ of *fi. fa.* by the attorney of the plaintiff, for the purpose of affording the sheriff information, is not a direction to execute the writ against the party pointed out, so as to render the attorney responsible if the indorsement should turn out to be incorrect, and relieve the sheriff from the responsibility of making inquiry and acting in the matter upon his own responsibility (u).

The parties answerable in damages, and liable to be made defendants in particular actions, have already been considered; such as actions for the infringement of rights naturally incident to the possession and ownership of land (ante, p. 10), or for disturbance in the enjoyment of easements, privileges, and incorporeal rights (ante, p. 65); actions for nuisances (ante, pp. 65, 76, 77, 106-108); actions for commissive and permissive waste (ante, pp. 112-133); actions for trespasses and injuries to real property (ante, p. 159), and for the seizure and conversion of chattels (ante, p. 223); for injuries to the person and to property from negligence (ante, pp. 256-258), and voluntary and involuntary trespasses (ante, pp. 259, 260); for the loss of goods delivered to a bailee or common carrier, or his servants, to be carried (ante, pp. 336, 337); goods wrongfully taken under colour of a distress for rent (ante, pp. 380, 381); actions for an assault and for false imprisonment (ante, pp. 416-418); for malicious arrest, malicious prosecution, and malicious abuse of legal process (ante, p. 446); for wrongs done under colour of legal process (ante, pp. 488-490); or a warrant of justices (ante, p. 542); or in the negligent execution of statutory powers

(t) *Dubois v. Krats*, 11 Ad. & E. 332. 307.
As to malicious prosecution see ante, pp. 433-456. *Wyatt v. White*, 8 W. R.

(u) *Childers v. Wooler*, 8 W. R. 321. Wightman, J., dissentiente.

or authorities (ante, p. 563); or for libel and slander (ante, pp. 610, 611); or fraudulent misrepresentation and deceit (ante, pp. 657, 658).

Liabilities of tenants-in-common.—If one tenant-in-common misuse that which he has in common with another, he is answerable to the other in an action as for misfeazance (*x*). He is responsible to his co-tenant-in-common, as we have seen, for cutting down trees, or pulling down walls, or the doing of any act tending to the lasting injury of the common property (*y*). An action for a trespass is maintainable by one tenant-in-common against his co-tenant-in-common for digging and carrying away brick earth or turf, as it destroys the subject-matter of the tenancy-in-common, and amounts in contemplation of law to an actual ouster (*z*).

Liabilities ex delicto of corporations.—A corporation by accepting a grant of land from the crown upon certain conditions as to the repair of sea-walls and defences, may render themselves liable to an action of tort at the suit of any party sustaining any private and peculiar damage from the non-repair of such sea-walls, &c. (*a*). A corporation may also be made responsible in an action for a trespass in breaking and entering a close, and for seizing goods, for every corporate body is liable in tort for the tortious acts of its agents and servants acting in the ordinary service of the corporation, without any order or authority under its common seal (*b*). A corporation may give a warrant to distrain without deed, and thus render itself responsible for a wrongful distress, and the jury may infer the agency of the corporation in the matter of a wrongful distress or seizure of goods from the fact of their having received the proceeds of the seizure (*c*).

An action for a wrong lies against a corporation where the thing done is within the purpose of the corporation, and it has been done in such a manner as to constitute what would be an actionable wrong if done by a private individual. Therefore, where an action was brought against the London General Omnibus Company for interfering with the rights of the plaintiff, by driving their omnibuses in such a manner as to molest him in the use of the highway, it was held that as the company was incorporated for the purpose of driving omnibuses, and the whole of the wrongful acts charged in the declaration of the cause of action were acts connected with the driving of their vehicles along the publick highway, and were, there-

(*x*) *Ld. Kenyon, C. J., Martyn v. Knowllys*, 8 T. R. 145.

(*y*) *Holt, C. J., Waterman v. Soper*, 1 *Ld. Raym.* 737. *Cubitt v. Porter*, ante, p. 155.

(*z*) *Wilkinson v. Haygarth*, 12 Q. B. 845.

(*a*) *Mayor, &c., of Lyme Regis v. Henley*, 1 Bing. N. C. 240.

(*b*) *Maund v. Monm. Rail. Co.*, 4 M. & Gr. 452; 5 Sc. N. R. 457.

(*c*) *Smith v. Birm. Gas Co.*, 1 Ad. & E. 526.

fore, within the purpose of their incorporation, an action for damages was maintainable against them. "We think it extremely important," observes Erle, J., "where such companies admit that they have in fact intentionally committed a wrong, that the publick should have a remedy against them, and not be driven to an action against their servants and others whom they have employed, and who may be entirely incapable of giving the recompense which the law may award" (d).

A corporation may become liable in damages for an assault and battery, or false imprisonment, committed by its servants in the exercise of its orders, or in the discharge of their duty, without proof of any authority under seal from the corporation (e). But where a corporation have employed a solicitor to conduct legal proceedings, the corporation are not necessarily liable for unlawful acts of which the solicitor may have been guilty in the conduct of the proceedings (f). A corporation aggregate may, as we have seen, be made responsible for the negligence and unskilfulness of its servants in the execution of the ordinary work and business of the corporation, without any proof that the work was ordered under the common seal (g).

It has been thought that an action for a malicious prosecution is not maintainable against a corporation aggregate (h), but express malice may be imputed to, and proved against, a corporation, and an action of libel may consequently be maintained against a corporation for the publication of libellous intelligence through the medium of their servants, acting in the course of their ordinary employment in the management of an electric telegraph (i). If it be essential to the conversion of property by a corporation that the act of conversion should have been authorized by them under their common seal, a jury may, from proof that the conversion was committed by the servants and agents of the corporation in the exercise of their ordinary employment and service, presume that the act was done under the common seal (k). But in the case of corporations called into existence for trading purposes, and carrying on trade through the medium of their servants and agents, the corporation may be made responsible for a conversion of property by such servants and agents, acting in the ordinary course of their employment in the business of the corporation (l). If the wrongful act was not done by the servant or agent

(d) *Green v. Lond. Gen. Om. Co.*, 29 Law, J., C. P. 13.

(e) *Eastern Co. Rail. Co. v. Broom*, 6 Exch. 314.

(f) *Eggington v. Mayor of Lichfield*, 5 Ell. & Bl. 112.

(g) Ante, p. 563. *Scott v. Mayor, &c. of Manchester*, 2 H. & N. 204.

(h) *Stevens v. Mid. Co. Rail. Co.*, 10 Exch. 352.

(i) *Whitfield v. S. E. R. Co.*, 27 Law, J., Q. B. 229; 1 Ell. Bl. & Ell. 121.

(k) *Yarborough v. Bank of England*, 16 East, 6.

(l) *Giles v. Taff Rail. Co.*, 2 Ell. & Bl. 631.

of the corporation in the exercise of his ordinary employment, or in discharge of his ordinary duties as servant of the corporation, it must be shown that the corporation has ratified and adopted the act.

When a joint-stock company is responsible for the tortious acts of the directors and managers.—We have already seen that railway companies and joint-stock companies are responsible for the tortious acts of their directors and managers, when acting in the discharge of their official duties, and within the scope of their authority as the managers of the company (ante, pp. 658, 659). Where the plaintiff set forth that he was entitled to certain "ear-marked shares" in a railway company; that these shares had been wrongfully declared forfeited; that the forfeiture had been confirmed at a general meeting of the shareholders of the company, and the shares directed to be sold; it was held that there was a good cause of action against the company. So, where the directors had been guilty of a wrongful act of omission in not registering the plaintiff's name in their books, whereby the plaintiff was deprived of the ordinary privileges of shareholders, and of any profits that might have arisen upon the shares, it was held that the company was responsible for the wrongful act of the directors (m). But where the directors have acted beyond the scope of their authority the company is not responsible for their acts, but the directors themselves are the parties to be made responsible in damages. Thus, where directors have signed false and fraudulent reports of the state and circumstances of a joint-stock company, such directors, and not the company, are the proper parties to be sued for the damages resulting from the misrepresentation. No body of shareholders can authorize directors to put forward fraudulent representations and false accounts of the transactions of the company, so as to render the company at large responsible for the fraud. That is a course which no body of shareholders could sanction against a single dissentient, or against a single absent shareholder (n).

Where false reports of the actual condition and circumstances of a joint-stock company were knowingly and designedly printed and circulated by the defendants and others in concert with them, with their signatures attached, and the plaintiff, relying upon the representations contained in these reports of the flourishing state of the concern, bought shares in it, and lost his money, and incurred serious liabilities, it was held that he was entitled to maintain an action for damages against the defendants (o).

(m) *Catchpole v. Ambergate, &c. Rail. Co.*, 1 Ell. & Bl. 120.

(n) *Davidson v. Tulloch*, 8 W. R. H. L. 309; 36 Law T. R. 97; ante, pp. 657-

659.

(o) Ante, pp. 636, 650. *Davidson v. Tulloch*, 8 W. R. 311; 36 Law T. R., 97.

Liabilities of trustees and commissioners of publick works.—We have already seen that commissioners acting strictly in the execution of a statutory authority, and not exceeding their jurisdiction or powers, are not personally responsible, nor are their officers or servants acting under them personally responsible, in an action for damages to a private individual who has sustained damage from their authorized acts; but if they act in a careless and oppressive manner, and are guilty of negligence or misconduct in the execution of the statutory authority, they are, as we have seen, responsible in damages for the consequences of their acts (*p*). Under certain acts of parliament, trustees and commissioners acting in the discharge of publick duties are, as we have seen, relieved from all personal liability whilst acting in the execution of the powers of the statutes (*ante*, pp. 552–554), but are charged with the duty of imposing rates and collecting a fund out of which all the expenses incurred in carrying the act into execution are to be made good (*ante*, pp. 555–557).

When it is provided by statute that commissioners or trustees appointed for the execution of publick works shall be sued by their clerk, or treasurer, or publick officer, an action is not maintainable against such officer, except where it could have been supported against the commissioners or trustees themselves (*q*); but whenever there has been a breach of duty on the part of the commissioners or trustees causing a private injury to another, an action is maintainable against their clerk or publick officer to recover compensation for such breach of duty (*r*). The clerk is not in general personally liable to make compensation out of his own private means, he being only the nominal defendant; but the funds of the trustees or commissioners may be made answerable for satisfaction of the damages (*s*).

Publick officers employed in the publick departments in the conduct and management of the publick business of the country, are not responsible for the negligence and misconduct of those who act under them, although such subordinate officers have been appointed by them. Thus the Lords Commissioners of the Treasury, the Commissioners of the Custom and Excise, the Auditors of the Exchequer, &c., have never been held liable in damages for the negligence or misconduct of the inferior officers in their several departments. We have seen that a Queen's officer stationed on board ship to do his duty there, is not responsible for the negligent acts of his subordinate officers (*ante*, p. 246), nor is the Postmaster-General responsible for the negligence or misconduct of clerks and letter-sorters employed

(*p*) *Ante*, pp. 552–555, *Boulton v. Crowther*, 2 B. & C. 706. *Sutton v. Clarke*, 6 Taunt. 43. *Harris v. Baker*, 4 M. & S. 29.

(*q*) *Hall v. Smith*, 2 Bing. 158.
(*r*) *Cane v. Chapman*, 5 Ad. & E. 647.
(*s*) *Wormwell v. Hailstone*, 6 Bing. 676.

and appointed by him for the execution of certain public duties in the Post Office, but these public functionaries are responsible to every individual who sustains damage by reason of their own personal neglect or misconduct (t). Thus, if the man who carries the letters to the post-office loses any of them, he is answerable; so is the sorter in the business of his department; so is the postmaster for any fault of his own (u). The collector of customs is, in like manner, responsible in damages to all who sustain a direct and immediate injury from a neglect by him to execute the duties of his office, and for refusing to sign a bill of entry which it was his duty to sign, or to make an order which it was his duty to make (x).

Whenever a public officer abuses or neglects the powers or duties of his office, either by an act of commission or omission, and in consequence thereof an injury accrues to an individual, an action for damages is maintainable against such public officer; and every one who is appointed to discharge a public duty, and receives a compensation, whether from the crown or otherwise, is constituted a public officer. If a bishop, by neglecting to perform the plain duties of his office, inflicts an injury upon another, an action for damages is maintainable against him. And if a clergyman wrongfully refuses to administer the sacrament to a man, who is thereby prejudiced in his civil rights, or the registrar of births should refuse to register the birth of a person and so cause him to lose an estate, an action for damages would be maintainable. So if a lord of a manor were to refuse or neglect to hold a court, by which a copyholder should be prevented from having admission to his copyhold, an action for damages would lie against such lord (y).

Military and naval commanding officers are not responsible for arrests made by them in the exercise and discharge of their military and naval authority (z); but if they exceed their authority, and make arrests for offences which are not military offences, and over which they have no jurisdiction or authority, they will be responsible in damages for their unlawful acts (a).

Master and servant.—The maxim, *qui facit per alium facit per se*, renders the master liable, as we have already seen, for all the negligent acts of the servant in the course of his ordinary employment (b); for the servant, when acting in the execution of the master's business, represents the master himself, and his acts are, in contemplation of law, the acts of the master. This rule of law applies, as we have seen, not only to

(t) *Lane v. Cotton*, 1 Salk. 17.

(u) *Whitfield v. Lord Le Despenser*,
Comp. 765.

(x) *Barry v. Arnaud*, 10 Ad. & E.
670.

(y) *Henly v. Mayor of Lyme*, 5 Bing.

108. *Ferguson v. Earl Kinnoul*, 9 Cl. &
Fin. 251.

(z) *Bradley v. Arthur*, 4 B. & C. 305.

(a) *Warden v. Bailey*, 4 Taunt. 67.

(b) Ante, pp. 241-248. *Sharrod v.*
Lond. & N. W., 4 Exch. 585.

domestic servants, who have the care of carriages, horses, and other things in the employ of the family (ante, p. 242), but to other servants whom the master or owner selects and appoints to do any work or superintend any business, although such servants be not in the immediate employ, or under the superintendence of the master. As, for instance, if a man is the owner of a ship, he himself appoints the master, and he desires the master to appoint and select the crew; the crew thus become appointed by the owner, and are his servants for the management and government of the ship, and if any damage happens through their default, it is the same as if it happened through the immediate default of the owner himself. So the same principle prevails if the owner of a farm has it in his own hands, and he does not personally interfere in the management, but appoints a bailiff or hind, or hires other persons under him, all of them being paid out of the funds of the owner, and selected by himself, or by a person specially deputed by him; if any damage happen through their default the owner is answerable, because their neglect or default is his, as they are appointed by and through him. So in the case of a mine, the owner employs a steward or manager to superintend the working of the mine, and to hire under-workmen, and he pays them on behalf of the owner. These under-workmen then become the immediate servants of the owner, and the owner is answerable for their default in doing any acts on account of their employer (c). But whenever one man employs another to execute a particular work respecting personal moveable property, and that other furnishes his own servants to do the work, the servants so furnished are not to be considered in the same light as if they were servants selected, hired, and paid by the person who orders the execution of the work (ante, pp. 258, 259).

Principal and agent.—In order to make the principal liable in tort for an injury caused by the wrongful act of the agent, it must be shown that the act was within the scope of the authority given by the party against whom the action is brought, for if the servant was not acting in the due course of his employment for his master, but in contravention of his duty to him, and against his interest, the master is not, as we have seen, responsible for the consequences of the act (d). Where a railway passenger was taken into custody by a railway servant by command of a superintendent for non-payment of a fare demanded, and an action was brought against the company for the unlawful imprisonment, it was held that, in order to render the defendants liable, the plaintiff was bound to show that the act of which he complained was done by an express or

(c) *Laugher v. Pointer*, 5 B. & C. 554.
Dalyell v. Tyrer, 28 Law, J., Q. B. 52.

(d) *Coleman v. Riches*, 16 C. B. 104;
24 Law, J., C. P. 125; ante, pp. 159, 241.

implied authority given by the defendants, or that it had been subsequently ratified by them, and that in the absence of any proof that the company had authorised their servant or superintendent to arrest any person who did not pay his fare, or of any subsequent act of ratification on the part of the company, that the company was entitled to a verdict under a plea of not guilty (e).

We have already seen that a principal who knowingly makes a false and fraudulent representation through the medium of an agent, is answerable in tort for the deceit (ante, pp. 657–659).

Subsequent ratification and adoption of a wrongful act by parties for whose use and benefit the act was done.—“He that receiveth a trespasser, and agrees to a trespass after it is done, is no trespasser,” observes Lord Coke, “unless the trespass was done to his use or for his benefit, and then his agreement subsequent amounteth to a precedent commandment, for in that case omnis ratihabitio retrotrahitur et mandato priori æquiparatur” (f). But to make the subsequent ratification equivalent to a precedent commandment, the act of trespass must have been committed in the name, and avowedly on behalf and for the benefit of the party subsequently ratifying it. If the trespass was not done for his use or benefit, or he is not in a situation to have originally commanded the act, then his subsequent assent does not make him a trespasser (g). “It is a known and well-established rule of law,” observes Tindal, C. J., “that an act done for another by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal if subsequently ratified by him. In that case the principal is bound by the act, whether it be for his detriment or advantage, and whether it be founded on a tort or a contract, to the same extent and with all the consequences which follow from the same act if done by his previous authority. Such was the precise distinction taken in the Year-Book, 7 Hen. 4, fo. 35, where it was held that if a bailiff took a heriot, claiming property in it himself, the subsequent agreement of the lord would not amount to a ratification of his authority as bailiff at the time; but if he took it at the time as bailiff of the lord, and not for himself, without, however, any command of the lord, yet the subsequent ratification by the lord made him bailiff at the time.” In accordance with this principle of law it has been held, “that where the sheriff acting under a valid writ of execution by the command of the court, and as the servant of the court, seizes the wrong person’s goods, a subsequent declaration by

(e) *Roe v. Birkenhead, Lanc. &c. Rail. Co.*, 7 Exch. 41.

(f) *Coke*, 4 Inst. 817. *Dallas, C. J.*, *Hull v. Pickersgill*, 1 B. & B. 282.

(g) *Wilson v. Barker*, 4 B. & Ad. 610; 1 N. & M. 400. *Nicoll v. Glennie*, 1 M. & S. 592.

the plaintiff in the original action ratifying and approving the taking, cannot alter the character of the original taking and make it a wrongful taking by the plaintiff in the original action" (h).

What amounts to evidence of ratification of a wrongful act.—But to make a man a trespasser by relation from having ratified and adopted an act of trespass done in his name, and for his benefit, it must be shown that the act was ratified and adopted by him with full knowledge of its being a trespass, or of its being tortious, or it must be shown that in ratifying and taking the benefit of the act he meant to take upon himself, without inquiry, the risk of any irregularity which might have been committed, and adopt the transaction, right or wrong. Promises to make inquiries, expressions of disapprobation of the conduct of the agent, accompanied by offers of compromise and overtures to purchase peace by returning the property taken, or paying the value of it, are of themselves no evidence of a ratification of the wrongful act (i).

Employer and contractor.—We have already seen, that when a person intrusts the execution of work to a contractor, who exercises an independent employment, and selects and pays his own workmen, the originator of the work is not responsible in general for injuries arising from the incompetence of the contractor, or the negligent execution of the work (ante, pp. 258, 259), unless lands or tenements in the actual occupation of the defendant have thereby been made a nuisance and source of annoyance to the adjoining occupiers (ante, p. 106).

Liabilities ex delicto of servants and agents executing the orders of their masters and employers.—All persons procuring, commanding, aiding, or assisting in the commission of a trespass, are principals in the transaction, and persons assenting to a trespass after it has been done may also become trespassers. Both the master who commands the doing, and the servant who does an act of trespass, may be made responsible as principals, and sued jointly for damages (k). A servant keeping the key of a room, knowing that a man is imprisoned therein, is a trespasser (l). Where an arrest has been made under process, which is afterwards set aside for irregularity, both the attorney who sued out the process and the client who set the attorney in motion may be sued for the assault and false imprisonment (ante, pp. 489, 490). The servant is, as we have seen, equally liable with the master in respect of his own personal participation in a wrongful act, and cannot discharge himself from liability on the ground that he acted under unavoidable ignorance and in obedience to his master's orders, nor can he justify under any authority from his master when his

(h) *Wilson v. Tummon*, 6 Sc. N. R. 906; 6 M. & Gr. 242.

(i) *Roe v. Birkenhead, &c.*, 7 Exch. 36.

(k) *Bates v. Pilling*, 6 B. & C. 38.

(l) *Bro. Abr.*, TRESPASS, pl. 133, 256,

265.

master had no authority in the matter (*m*). A servant may, as we have seen, be liable for a conversion to which he is a party, though he is acting in obedience to the commands of his master, and under authority from him (*n*). But a servant who has charge of goods received by him from his master is not, as we have seen, responsible for a conversion of them, merely because he refuses to give them up on the demand of a stranger (*ante*, p. 188).

Joinder of husband and wife as defendants.—The husband is by law answerable for all actions for which his wife stood attached at the time of the marriage, and also for all her torts and trespasses during coverture; but the action must be against them both jointly, for if she alone were sued, it might be a means of making the husband liable without giving him an opportunity of defending himself (*o*). The husband takes his wife with all her obligations and liabilities. If, therefore, at the time of her marriage she is tenant of certain premises, and has received notice to quit, the husband after the marriage incurs the obligation of giving up possession of the premises, and may render himself liable to an action for double value for holding over; for if the wife incurs the penalty the husband will have to pay it, and he cannot get rid of the obligation by pleading ignorance, for it is his duty to make inquiry; nor by showing that his wife deceived him, or concealed the notice to quit (*p*).

The husband must be sued jointly with the wife for an assault or libel committed by the wife, or for the destruction or conversion of property by the wife, or for any act of trespass committed by her during the coverture (*q*). He continues answerable in damages to all persons who have been injured by the wrongful act of the wife so long as the relation of husband and wife continues, though they are living apart (*r*), unless they are separated under a decree of judicial separation, in which case the husband is not liable for the wife's tortious acts committed during the period of such separation (*s*).

The husband and wife are liable for frauds committed by the wife, unless the fraud is directly connected with the contract of the wife, and is the means of effecting it, and parcel of the same transaction, in which case the wife is not responsible, and the husband cannot be sued for it. An action, for example, will not lie against husband and wife for a false and fraudulent representation by the wife to the plaintiff that she was sole and unmarried at the time of her signing a promissory note as

(*m*) *Stephens v. Elwell*, 4 M. & S. 201.
Bennett v. Bayes, 8 W. R. Exch. 320.

(*n*) *Perkins v. Smith*, 1 Wils. 328.
Davies v. Vernon, 6 Q. B. 443.

(*o*) BAC. ABR., BARON AND FEME, L.

(*p*) *Lake v. Smith*, 1 B. & P., N. R.

179.

(*q*) *Catterall v. Kenyon*, 3 Q. B. 315.
Keyworth v. Hill, 3 B. & Ald. 686.
Draper v. Fulkes, Yelv. 165.

(*r*) *Head v. Briscoe*, 5 C. & P. 484.

(*s*) 20 & 21 Vict. c. 85, s. 26.

surety for him to a third person, whereby he was induced to advance a sum of money to that person (t).

Where a married woman signed and delivered a distress warrant to a bailiff, and directed him to distrain the goods of a tenant, under the impression that she had a right to distrain when she had no such right, and the plaintiff having been sued and compelled to pay damages for the illegal distress, brought an action of tort for deceit against the wife and her husband, it was held that the action was not maintainable, as it was not founded upon an alleged assertion of the wife that she had a right to distrain, and there could be no retainer of the plaintiff to distrain given by the wife, nor any contract by her to indemnify him (u).

Whenever both husband and wife are jointly concerned in the commission of a wrongful act both are liable, whatever may be the result as to damages, in case the wife should survive her husband (x).

The husband of an executrix or administratrix is liable in respect of all assets received and wasted, and devastavits committed by himself or by his wife during the coverture, and his estate remains liable after his death (y).

After the death of the wife the surviving husband is discharged from all responsibility for her tortious acts, unless he himself participated therein, or authorised or instigated them, in which case he will be responsible, like any other master who has committed a tortious act through the medium of his servant. After the death of the husband the wife may be sued alone for all tortious acts in which she has participated, whether she was a sole actor in them or whether they were committed by her at the instigation or under the influence and direction of her husband (z). And the same rule of law prevails where the husband has abjured the realm, or been transported, and is thereby civiliter mortuus (a).

Of the liability of married women for wrongs done by them after a judicial separation.—In every case of a judicial separation the wife so separated is considered a feme sole, for the purpose of being sued for wrongs and injuries done by her, and her husband is not liable for any wrongful act or omission by her (b).

Liabilities ex delicto of infants.—An infant in the actual occupation of land is responsible for nuisances and injuries to his neighbour, arising from the negligent use and management of the property. A man who has made a contract with an infant cannot convert anything that arises out of that contract into a tort, and seek to enforce the contract through

(t) *Liverpool Adelpbi Loan Association v. Fairhurst*, 9 Exch. 429.

(u) *Raulings v. Bell*, 1 C. B. 950.

(x) *Vine v. Saunders*, 4 Bing. N. C. 99.

(y) *Smith v. Smith*, 21 Beav. 385.

(z) *Vine v. Saunders*, 4 Bing. N. C. 102.

(a) Bac. Abr., BARON AND FEME, M.

(b) 20 & 21 Vict. c. 85, s. 26.

the medium of an action of tort. Therefore, where a lad hired a mare, and injured it by immoderate riding, it was held that a plea of infancy was an answer to the action, the action being founded on a contract (c). An infant is not liable for conversion of goods if the cause of action is grounded on matter of contract with the infant, and constitutes a breach of contract as well as a tort (d). Neither is he liable, as previously mentioned, to an action for a fraudulent representation or a breach of warranty (e); nor is he chargeable on the custom of the realm as a common innkeeper.

But if an infant gets goods into his hands by fraud and false pretences, or under colour of a pretended contract, and then refuses to deliver up the goods on the demand of the party who has been defrauded of the possession of them, he cannot, if the goods were in his hands or under his control at the time they were demanded back, set up his minority as a defence to an action grounded on such demand and refusal (f).

Where an action for money had and received was brought against an infant to recover money which the infant had embezzled, Lord Kenyon said that infancy was no defence to the action; that infants were liable to actions ex delicto, though not ex contractu; and though the action was in form an action of the latter description, yet it was ex delicto in point of substance; that if an action of trover had been brought for any part of the property embezzled, or an action grounded on the fraud, infancy would have been no defence; and that as the object of the action was precisely the same, his opinion was that the same rule of law should apply (g).

Liabilities of executors and administrators for wrongs committed by their testator or intestate.—An action does not in general lie at common law against executors to recover damages for waste committed by their testator, it being a tort which dies with the person (h). They are not responsible in damages for injuries done by their testator in cutting down another man's trees, or for trespasses committed by him in entering in his lifetime upon another man's land, and prostrating fences, or digging therein, where the wrongdoer acquires no gain to himself from the commission of the wrong; but wherever by the wrong done property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor. So far as the tort itself goes, an executor shall not be liable; but so far as the act of the offender is beneficial, his assets ought to be answerable, and his executor therefore shall be

(c) *Jennings v. Rundall*, 8 T. R. 336.

(d) *Manby v. Scott*, 1 Sid. 120.

(e) *Ante*, p. 661. *Howlett v. Haswell*, 4 Campb. 118. *Green v. Greenbank*, 2 Marsh. 485.

(f) *Mills v. Graham*, 1 B. & P., N. R. 145.

(g) *Bristow v. Eastman*, 1 Esp. 172.

(h) 2 Inst. 301.

charged. Where, therefore, trees, coals, or minerals wrongfully severed by one man from the soil and freehold of another, have been sold by the wrongdoer, and the latter dies, his estate, in the hands of his executor, is answerable for the price, and an action for money had and received may be maintained against the executor for the recovery thereof (i).

Personal representatives are not responsible for a conversion or unlawful detention by their testator or intestate in his lifetime of another man's chattels, the private wrong being, as we have seen, buried with the offender. But where there has been a conversion of property by the deceased, which has benefited his personal estate, the personal representative may, in general, be sued in form *ex contractu*, founded on the tort. "Thus an action on the custom of the realm against a common carrier for not receiving and carrying goods, being for a tort, will not lie against an executor; but an action *ex contractu* for the same cause will lie. If a man take a horse from another, and bring him back again, an action for the trespass will not lie against his executor, but an action for the use and hire of the horse by the deceased may be maintained" (k). Where the plaintiff declared that he was possessed of a cow which he delivered to the testator to keep for him, and that the testator sold the cow, and converted and disposed of the money to his own use, it was held that the executor was not responsible in trover for the conversion of the cow by the testator, but that he might be made liable for the value of the cow in an action for money had and received (l).

No action lies against an executor of a deceased sheriff, gaoler, or officer, for an escape suffered or permitted by his testator, or by reason of his testator's having neglected to attend and give evidence in a cause in obedience to a subpoena served upon him in his lifetime (m).

Wrongs committed by a deceased person within six months before his death.—By 3 & 4 Wm. 4, c. 42, s. 2, reciting that there was no remedy provided by law for certain wrongs done by a person deceased in his lifetime to another in respect of his property, real or personal, it is enacted, that an action of trespass or case may be maintained against the executors or administrators of any person deceased, for any wrong committed by him in his lifetime to another in respect of his property, real or personal, so as such injury shall have been committed within six calendar months before such person's death; and so as such action shall be brought within six calendar months after such executors or administrators shall have taken upon themselves the administration of the estate and effects of such person; and the damage to be recovered in such action shall be payable

(i) *Powell v. Rees*, 7 Ad. & E. 428.*Perkinson v. Gilford*, Cro. Car. 539.(k) *Hamblly v. Trotth*, Cowp. 375.

(m) Williams on Executors, pt. 4,

(l) *Bailey v. Birtles*, T. Raym. 71. bk. 2.

in like order of administration as the simple contract debts of such person. Where a watch was shown to have been in the possession of a testatrix more than six months before her decease, and she was asked within the six months to give it up, and wrongfully refused, this was held to be evidence of a conversion within six months of her death (n).

Actions against the executor of a prebendary, vicar, or incumbent of a benefice for dilapidations are maintainable where the prebendal-house, or the buildings, hedges, and fences belonging to the prebendary, vicarage, or benefice, are left in a state of decay, or where there has been a felling of timber otherwise than for repairs or fuel (o); but the incumbent of a vicarage cannot maintain an action against the executor of his predecessor for not cultivating the glebe-land in a husbandlike manner (p).

Actions against executors for a devastavit.—Formerly, if an executor committed a devastavit and died, the wrong died with him, so that his executor was not liable for it; but by 30 Car. 2, c. 7, and 4 & 5 Wm. and M. c. 34, s. 12, the executors or administrators of any executor or administrator, who shall waste or convert to his own use the estate of his testator or intestate, shall be liable in the same manner as their testator or intestate would have been if they had been living.

Liabilities of executors and administrators for their own wrongful acts.—If a testator or intestate at the time of his death was in the possession of the goods and chattels of third parties, and had no lien upon them, and these goods come into the possession of his personal representatives after his decease, or under their dominion and control, and they refuse to give them up to the owners on demand made by the latter, they are responsible in damages for a conversion or unlawful detention of the property. But those only who have been guilty of the tort should be made defendants. Thus, if there are three executors, and one only of the three has got possession of, or has meddled with, the goods of the plaintiff, that one alone should be sued.

Liabilities of assignees in bankruptcy and insolvency.—Assignees of the estate and effects of bankrupts may, with leave of the court and not otherwise, defend any action or suit which the bankrupt might have defended, and in such case their costs may be allowed out of the bankrupt's estate. Assignees of a bankrupt lessee are not liable as assignees of a lease unless they have done some act which unequivocally indicates that they have elected to take the lease. No general rule can be laid down as to the effect of their remaining in possession of the demised premises, or paying rent for them. Each case must be determined by the peculiar circum-

(n) *Richmond v. Nicholson*, 8 Sc. 137.

(o) *Radcliff v. D'Oyly*, 2 T. R. 630.
Wise v. Metcalfe, 10 B. & C. 312; 1

Saund. 216 a, note a.

(p) *Bird v. Relph*, 4 B. & Ad. 830.

stances belonging to it. When these are equivocal, the lessor should avail himself of the power given by the Bankrupt Act to apply to the Court of Bankruptcy that the assignees may be put to their election (q).

Of the continued liability of a bankrupt or insolvent to actions ex delicto.

—The bankrupt and insolvent acts do not exempt a bankrupt or insolvent from actions for damages in respect of wrongs done by them prior to or during the bankruptcy or insolvency, for the damages do not constitute a debt until they have been assessed by a jury, and judgment for them has been obtained (r). If the action has been tried, and damages recovered, before the granting the certificate or the discharge, so that the amount has become a judgment-debt provable against the estate, then the certificate in bankruptcy, or the final order in insolvency, will be a bar to further proceedings thereon (s).

Of the number of the defendants in actions ex delicto—Parties jointly and severally liable.—Whoever wilfully assists in the doing of an unlawful act becomes answerable for all the consequences of such act; and when several persons have been jointly concerned in the commission of a wrongful act, they may in general, as we have seen, all be charged jointly as principals, or the plaintiff may sue any of the parties upon whom individually a separate trespass attaches (t).

Torts are in their nature several, and in all actions of tort, therefore; one defendant may be acquitted and others found guilty.

In the case of actions for the wrongful conversion of property, several parties may be joined as defendants, and one or more of them be found guilty and the rest acquitted; and unless all are implicated in a joint conversion, all cannot be found guilty (u). But where the action, though for a tort, is founded on a contract, and several defendants are sued jointly, it has been doubted whether one can be acquitted and another found guilty (x). Where an action was brought against two defendants for deceit, alleged to have been committed in a joint sale by them of some sheep, and the declaration set forth that the defendants sold to the plaintiff some sheep, their joint property, and warranted them to be sound, and they proved to be unsound, and there was no evidence to affect one of the defendants, it was held that the action was founded on the joint contract of both, and that one defendant could not be acquitted and the other found guilty (y).

(q) *Goodwin v. Noble*, 8 Ell. & Bl. 587; 27 Law, J., Q. B. 204.

(r) *Lloyd v. Peell*, 3 B. & Ald. 408. *Parker v. Crole*, 5 Bing. 63. *Parker v. Norton*, 6 T. R. 699.

(s) *Longford v. Ellis*, 1 H. Bl. 29 n. *Greenway v. Fisher*, 7 B. & C. 436.

(t) *Ld. Kenyon, C. J., Mitchell v. Tarbutt*, 5 T. R. 651. *Sutton v. Clarke*, 6 Taunt. 29.

(u) *Nicoll v. Glennie*, 1 M. & S. 588.

(x) *Pozzi v. Shipton*, 8 Ad. & E. 975.

(y) *Weall v. King*, 12 East. 452.

By the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), a misjoinder of defendants may be amended either before or at the trial (post, s. 3).

When an action has been brought against several joint-trespassers, the evidence must be confined to the joint offence in which all are implicated. The plaintiff cannot recover for what was done by one or more before or after the joint act (*z*); and when an action is brought for one joint-trespass, and the plaintiff elects to go for a trespass committed at any particular time, he must confine himself to that period; and if all the defendants were not then concerned in the trespass then committed, the plaintiff cannot have recourse to a trespass committed at a future time, when some of the defendants were concerned who were not implicated in the first transaction (*a*), for some of the defendants might be thereby subjected to damages for a trespass wherein they had no part or concern (*b*); but if he fails in proving a joint-trespass by all on the day he at first selects, he is at liberty to abandon that trespass and to prove a joint-trespass at another period (*c*).

When the plaintiff's evidence discloses no joint-trespass committed by all the defendants, but only separate trespasses by each, the plaintiff may be put to his election against which of the several defendants he will proceed (*d*).

One of several partners cannot, as we have seen, drag the firm or his co-partners into a trespass by signing a warrant or authority for the doing a wrongful act in the name of the firm of which he is a member; for one partner has no authority to bind the partnership to the commission of a wrongful act without the previous consent or subsequent concurrence of all the partners (*e*). If the act is done by the one partner for the benefit of the firm, and the firm afterwards take advantage of the act, and adopt the transaction, they may then, as we have seen, become responsible for it.

(*z*) *Aaron v. Alexander*, 3 Campb. 35.

(*a*) *Sedley v. Sutherland*, 3 Esp. 204.

(*b*) *Ibid.* *Tait v. Harris*, 6 C. & P.

73.

(*c*) *Roper v. Harper*, 5 Sc. 250; 4

Bing. N. C. 20.

(*d*) *Howard v. Newton*, 2 Mood. & Rob. 510.

(*e*) *Petrie v. Lamont*, C. & M. 96.

SECTION III.

OF NON-JOINDER AND MIS-JOINDER OF PARTIES—AMENDMENT BEFORE AND
AT THE TRIAL.

By the Law and Equity Bill now before Parliament it is provided (s. 42), that the joinder of too many plaintiffs shall not be fatal, and that judgment may be given in favour of such one or more of the plaintiffs as shall be adjudged by the court to be entitled to recover.

Amendment of non-joinder and mis-joinder before trial.—By the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76, s. 34), it is enacted, that “it shall be lawful for the court or a judge, at any time before the trial of any cause, to order that any person not joined as plaintiff shall be so joined, or that any person originally joined as plaintiff shall be struck out, if it shall appear that injustice will not be done by such amendment, and that the person to be added consents, either in person or by writing under his hand, to be so joined, or that the person to be struck out was originally introduced without his consent, or that such person consents in manner aforesaid to be so struck out; and such amendment shall be made upon such terms as to the amendment of the pleadings (if any), postponement of the trial, and otherwise, as the court or judge by whom such amendment is made shall think proper; and when any such amendment shall have been made, the liability of any person who shall have been added as co-plaintiff shall, subject to any terms imposed as aforesaid, be the same as if such person had been originally joined in such cause.”

Amendment at the trial.—It is further enacted (15 & 16 Vict. c. 76, s. 35), that in case it shall appear at the trial of any action that there has been a mis-joinder of plaintiffs, or that some person, not joined as plaintiff, ought to have been so joined, and the defendant shall not, at or before the time of pleading, have given notice in writing that he objects to such non-joinder, specifying therein the name or names of such person, such mis-joinder or non-joinder may be amended as a variance at the trial by any court of record holding plea in civil actions, and by any judge sitting at nisi prius, or other presiding officer, in like manner as in the case of amendments of variances under the statute 3 & 4 Wm. 4, c. 42, if it shall appear to such court, or judge, or other presiding officer, that such mis-joinder or non-joinder was not for the purpose of obtaining an undue advantage, and that the person to be added consents, either in person or

by writing under his hand, to be so joined, or that the person to be struck out was originally introduced without his consent, or that such person consents in manner aforesaid to be so struck out; and such amendment shall be made upon such terms as the court, or judge, or other presiding officer by whom such amendment is made shall think proper; and when any such amendment shall have been made, the liability of any person who shall have been added as co-plaintiff shall, subject to any terms imposed as aforesaid, be the same as if such person had been originally joined in such action.

Amendment after notice or plea in abatement of non-joinder of parties.—

It is also enacted (15 & 16 Vict. c. 76, s. 36), that in case notice of non-joinder be given, or any plea in abatement of non-joinder of a person as co-plaintiff, in cases where such plea in abatement may be pleaded, be pleaded by the defendant, the plaintiff shall be at liberty, without any order, to amend the writ and other proceedings before plea, by adding the name of the person named in such notice or plea in abatement, and proceed in the action without any further appearance, on payment of the costs occasioned by such amendment; and, in such case, the defendant shall be at liberty to plead *de novo*.

Mis-joinder of defendants in actions of tort founded on contract.—Amendment before or at the trial.—By 15 & 16 Vict. c. 76, s. 37, it is enacted, that it shall be lawful for the court or a judge, in the case of the joinder of too many defendants in any action on contract, at any time before the trial of such cause, to order that the name or names of one or more of such defendants be struck out, if it shall appear to such court or judge that injustice will not be done by such amendment; and the amendment shall be made upon such terms as the court or judge, by whom such amendment is made, shall think proper; and in case it shall appear at the trial of any action on contract that there has been a mis-joinder of defendants, such mis-joinder may be amended as a variance at the trial, in like manner as the mis-joinder of plaintiffs (ante, p. 737), and upon such terms as the court, or judge, or other presiding officer by whom such amendment is made shall think proper.

Under the power of amendment given by this section, a mis-joinder of defendants may be amended at the trial, by striking out the name of a defendant against whom judgment by default^(f) has been signed (*f*). But the section applies only where the party has been erroneously joined, not where the question of his liability has been left to the jury and a verdict has been given in his favour (*g*). The court will not review the discretion

(*f*) *Greaves v. Humphreys*, 24 Law, J., Q. B. 190.

(*g*) *Wickens v. Steel*, 2 C. B., N. S. 492; 26 Law, J., Q. P. 241.

of the judge where he has refused to amend, but will control an improper exercise of the power of amendment (*h*).

Actions of tort founded on contract—Plea in abatement for non-joinder of defendants—Amendment of proceedings.—It is also enacted (15 & 16 Vict. c. 76, s. 38), that in any action on contract where the non-joinder of any person or persons as a co-defendant or co-defendants has been pleaded in abatement, the plaintiff shall be at liberty, without any order, to amend the writ of summons and the declaration, by adding the name or names of the person or persons named in such plea in abatement as joint-contractors, and to serve the amended writ upon the person or persons so named in such plea in abatement, and to proceed against the original defendant or defendants, and the person or persons so named in such plea in abatement. But it is provided that the date of such amendment shall, as between the person or persons so named in such plea in abatement, and the plaintiff, be considered for all purposes as the commencement of the action.

(*h*) *Holden v. Ballantine*, 8 W. R. 390; Q. B. 30 Law, T. R. 149.

CHAPTER XX.

OF PLEADINGS, DEFENCES, AND EVIDENCE IN ACTIONS EX DELICTO.

SECTION I.—*Pleadings and defences in actions ex delicto.*—Abolition of forms of action—Joinder of different causes of action in the same suit—Requisites of the declaration—Statement of special damage—Several counts in declarations—What matters must be specially pleaded—Pleading several matters of defence—Traverses—Requisites of special pleas—Fictitious and needless averments—Defences arising after the commencement of the action—Payment of money into court—Pleas of infancy, accord and satisfaction, pendency of another action for the same cause, judgment recovered, bankruptcy or insolvency of the plaintiff, statutes of limitations—Equitable defences—Joinder of issue—New assignments—Demurrers.

SECTION II.—*Proceedings and evidence at the trial.*—Right to begin—Compe-

tency of plaintiffs and defendants to give evidence—Proof of publick and private statutes, journals of parliament, royal proclamations, criminal proceedings, records and proceedings of the superior courts, judges' orders, proceedings before magistrates—Proof by sworn or certified copies of books, registers, or original documents, licenses, &c.—Oral evidence of particular facts and circumstances, notwithstanding the existence of a written memorial thereof—Proof by oral testimony where the law requires a memorandum in writing of the circumstances—Evidence of admissions of liability—Offers to make compensation or to pay money—When a party is estopped from contradicting his own representations—Evidence in particular actions—Amendment of variances at the trial.

SECTION I.

OF PLEADINGS, DEFENCES, AND EVIDENCE IN ACTIONS EX DELICTO.

Abolition of forms of action—Joinder of different causes of action in the same suit.—By the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76) it is enacted (s. 3), that it shall not be necessary to mention any form or cause of action in any writ of summons, and (s. 41) that causes of action, of whatever kind, provided they be by and against the same parties and in the same rights, may be joined in the same suit; excepting replevin or ejectment, and where two or more of the causes of action so joined are

local, and arise in different counties, the venue may be laid in either of such counties; but the court or a judge has power to prevent the trial of different causes of action together, if such trial would be inexpedient, and may order separate records to be made up, and separate trials to be had; also (s. 40) that in any action brought by a man and his wife for an injury done to the wife, in respect to which she is necessarily joined as co-plaintiff, it shall be lawful for the husband to add thereto claims in his own right.

Requisites of the declaration. — Every declaration of the cause of action must have a certain formal commencement and conclusion, and the name of the county from which the jury are to come to try the action is in all cases to be stated in the margin of the declaration, and taken to be the venue intended by the plaintiff, and no venue is to be stated in the body of the declaration, or in any subsequent pleading; but wherever local description is required such local description is to be given (i), and the cause of action must be proved to have arisen at the particular place named: but where local description is not necessary, and the declaration does not allege that the injury was done in any particular locality, it is not necessary to prove the exact place where it was done (k).

The plaintiff is at liberty in all personal actions to lay his venue where he pleases, and the court will not make an order for changing the venue, unless there is manifest inconvenience or impropriety in trying the cause in the county selected by the plaintiff (l).

When the declaration is for a breach of duty, the facts creating the duty should be set forth on the face of the declaration. It is not enough to state that it was the duty of the defendant to do the act which he is stated to have neglected to do (m). "The decisions," observes Lord Campbell, "show that the allegation of duty in a declaration is in all cases immaterial, and ought never to be introduced, for if the particular facts set forth raise the duty, the allegation is unnecessary; and if they do not, it will be unavailing. If the particular facts stated in the declaration do not raise the duty, it cannot be established by other facts not stated. The declaration, therefore, must stand or fall by the facts stated" (n).

The novelty of the particular complaint set forth in a declaration is no objection to it, provided it shows an injury cognizable by law (o).

Statement of special damage. — If any peculiar or special damage has

(i) 15 & 16 Vict. c. 76, ss. 59, 60. Reg. Gen. 16 Vict. 1 Ell. & Bl. App. lxxix.

(k) *Simmons v. Lillystone*, 8 Exch. 441; 22 Law, J., Exch. 218.

(l) *Helliwell v. Hobson*, 3 C. B., N. S., 701.

(m) *Brown v. Mallett*, 5 C. B. 615. *Metcalf v. Hetherington*, 11 Exch. 269.

(n) *Seymour v. Maddox*, 16 Q. B. 331.

(o) *Ashby v. White*, 1 Smith's L. C. 213.

been sustained by the plaintiff, it should be stated in the declaration, with such reasonable particularity as to give notice to the defendant of the peculiar nature of the injury. Where the action is not maintainable at all without proof of special damage, then the fact of special damage having been sustained cannot be given in evidence without statement of it in the declaration; and in other actions, such as actions for words which are actionable in themselves, particular instances of special damage cannot be given in evidence, unless they are particularized in the declaration (*p*).

It is not necessary in a declaration by a plaintiff, who sues as the administrator of his deceased wife for his own benefit as husband, to disclose or allege any pecuniary damage suffered by the plaintiff beyond the ordinary claim for damages (*q*).

Several counts in declarations in respect of the same cause of action.—By the rules and orders made by the judges pursuant to the Common Law Procedure Act, 1852, it is provided that, except as hereinafter mentioned, several counts on the same cause of action shall not be allowed, and any count or counts used in violation of the rule may, on the application of the party objecting, within a reasonable time, or before an order made for time to plead, be struck out or amended by the court or a judge, on such terms as to costs or otherwise as such court or judge may think fit; but the court or judge may allow such counts on the same cause of action as may appear to be proper for the purpose of determining the real question in controversy between the parties on its merits, subject to such terms as to costs and otherwise as the court or judge may think fit. And when no rule or order has been made as to costs, and on the trial there is more than one count founded on the same cause of action, and the judge or presiding officer before whom the cause is tried shall, at the trial, certify to that effect on the record, the plaintiff will be liable for all costs occasioned by such count, in respect of which he has failed to establish a distinct cause of action, including those of the evidence as well as those of the pleading (*r*).

Of pleas in actions ex delicto.—In actions for a wrong or a breach of duty, the plea of not guilty operates, as we have seen, as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement (*s*), and no other defence than such denial is admissible under that plea. All other pleas

(*p*) *Browning v. Newman*, 1 Str. 666; ante, p. 612.

(*q*) *Chapman v. Rothwell*, 27 Law, J., Q. B. 315; ante, p. 261.

(*r*) *Mercer v. Stanbury*, 25 Law, J., Exch. 316; 2 H. & N. 155 n. As to

declarations in particular actions, see ante, pp. 10–12, 65–68, 108–111, 184, 185, 159, 160, 224, 225, 260, 261, 293, 294, 338, 339, 381–383, 418, 419, 446–448, 491, 492, 543, 544, 572, 611–613, 656.

(*s*) *Dunford v. Trattles*, 12 M. & W. 534.

in denial must take issue on some particular matter of fact alleged in the declaration (*t*). But where an action is brought against a master or employer for injuries sustained through the negligence of his servant or workman in doing his master's work, or executing his orders, the plea of not guilty puts in issue the fact whether the party doing the injury was the servant of the defendant, and whether he was doing his work or executing his orders (*u*). If several wrongful acts are alleged in the same declaration, the plea of not guilty puts them all in issue (*x*). Where special damage is substantially the thing complained of, as in actions for verbal slander, where the words spoken are not actionable *per se*, the plea of not guilty puts in issue the existence of the special damage (*y*).

What matters must be specially pleaded.—By the new rules of pleading it is provided, that in all actions for torts, all matters in confession and avoidance of the cause of action, shall be pleaded specially, as in actions on contract (*z*).

Of pleading several matters of defence.—The defendant may, by leave of the court or a judge, plead, in answer to the declaration or other subsequent pleading of the plaintiff, as many several matters as he shall think necessary for his defence, upon an affidavit being made by him or his attorney, if required by the court or judge, to the effect that he is advised or believes that he has just ground to traverse the several matters proposed to be traversed by him, and that the several matters sought to be pleaded are respectively true in substance and in fact. But the pleas of not guilty, release, statute of limitations, bankruptcy of the defendant, discharge under an insolvent act, coverture, denial that the property, an injury to which is complained of, is the plaintiff's, leave and license, and son assault demesne, may be pleaded together as of course, without leave (*a*).

Except in cases specifically provided for, if either party plead several pleas, replications, avowries, cognizances, or other pleadings, without leave of the court or a judge, the opposite party is at liberty to sign judgment; which may, however, be set aside upon an affidavit of merits (*b*).

Several pleas, replications, or subsequent pleadings, or several avowries or cognizances, founded on the same ground of answer or defence, are not to be allowed, unless they appear to the court or judge to be proper

(*t*) Reg. Gen. Hil. Term, 16 Vict. 1 Ell. & Bl. app. lxxxii.

(*u*) *Mitchell v. Crassweller*, 13 C. B. 245.

(*x*) *Card v. Card*, 5 C. B. 632.

(*y*) *Wilby v. Elston*, ante, p. 614.

(*z*) Reg. Gen. Hil. Term, 16 Vict. 1 Ell. & Bl. app. lxxxii. As to the plea of

Not guilty, and pleading specially in particular actions, see ante, pp. 12, 13, 68, 69, 111, 161, 225, 261, 295, 339, 386, 420, 492, 544, 564, 565, 613, 614, 656.

(*a*) 15 & 16 Vict. c. 76, ss. 81, 84.

(*b*) 15 & 16 Vict. c. 76, s. 86. *Messiter v. Roe*, 13 C. B. 162.

for determining the real question in controversy between the parties on its merits, and subject to such terms as to costs and otherwise as the court or judge may think fit. When no rule or order has been made, and on the trial there is more than one plea, replication, or subsequent pleading on the record, founded on the same ground of answer or defence, and the judge or presiding officer, before whom the cause is tried, certifies to that effect on the record, the defendant will be liable for all costs occasioned by such plea or other pleading, in respect of which he has failed to establish a distinct ground of answer or defence, including those of the evidence as well as those of the pleading (c).

Traverses by the defendant.—The defendant may either traverse generally such of the facts contained in the declaration as might have been denied by one plea, or may select and traverse separately any material allegation in the declaration, although it might have been included in a general traverse. He is at liberty also to traverse the whole or part of a replication or subsequent pleading of the plaintiff by a general denial, or, admitting some part or parts thereof, to deny all the rest, or to deny any one or more allegations (d).

Traverses by the plaintiff.—The plaintiff, on the other hand, is at liberty to traverse the whole of any plea or subsequent pleading of the defendant, by a general denial; or, admitting some part or parts thereof, to deny all the rest, or to deny any one or more allegations (e).

By 15 & 16 Vict. c. 65, it is enacted, that special traverses shall not be necessary in any pleading.

Requisites of special pleas.—A plea pleaded generally to the whole declaration must offer a good answer in point of law to all the causes of action comprised therein. If it does not do this it is bad, and the plaintiff is entitled to judgment for so much as is not covered by the plea (f). A plea, which is a good plea to some only of the counts of a declaration, should in the introductory part thereof be confined to those counts, and not be pleaded generally to the whole declaration, notwithstanding s. 75 of the Common Law Procedure Act, 1852, which enacts, that pleas capable of being construed distributively shall be taken distributively, for that has reference only to the finding of the jury upon the issues joined (g). If a plea, which professes to answer the whole of the declaration, is in truth an answer only to part, the plaintiff may be entitled to judgment non obstante veredicto (h).

(c) Reg. Gen. 10 Vict. 1 Ell. & Bl. app. lxxix.

(d) 15 & 16 Vict. c. 76, ss. 76, 78.

(e) 15 & 16 Vict. c. 76, s. 77.

(f) *Rogers v. Spence*, 12 Cl. & Fin. 718.

(g) *Jervis, C. J., Gabriel v. Dresser*, 15 C. B. 627. *Wilkinson v. Kirby*, 23 Law, J., C. P. 224. *Chappell v. Davidson*, 2 Jur. N. S. 544. But see *Blagrove v. Brist. Wat. Co.*, 1 H. & N. 387.

(h) *Lyne v. Siegfeld*, 1 H. & N. 281.

In an action of libel, where the declaration sets out several distinct libels in different counts, the defendant cannot plead one plea in justification of the whole, but must plead the truth of the libel to each count separately (i).

Any plea, good in substance, is not objectionable (s. 74) on the ground of its treating the declaration either as framed for a breach of contract or for a wrong. No formal defence is required in a plea, or avowry, or cognizance, and it is not necessary to state in a second or other plea, or avowry, or cognizance, that it is pleaded by leave of the court or a judge, or according to the form of the statute, or to that effect (k).

Where proof of the precise locality is material to the defence, and the place is not described in the declaration (ante, p. 741), the defendant is bound to show it by his pleading (l).

Of fictitious and needless averments in pleading.—All statements which need not be proved, such as the statement of time, quantity, quality, and value, where these are immaterial; the statement of losing and finding, and bailment, in actions for goods, or their value; the statement of acts of trespass having been committed with force and arms, and against the peace, &c., and all statements of a like kind, are to be omitted in pleading (m).

"It is an elementary rule in pleading, that when a state of facts is relied on it is enough to allege it simply, without setting out the subordinate facts which are the means of producing it, or the evidence sustaining the allegation. Thus, in a case very familiar, if a trespass be justified by a plea of highway, the pleader never states how the locus in quo became a highway; and if the plaintiff's case is that the locus in quo, by an order of justices, award of inclosure commissioners, local act of parliament, or any other lawful means, had ceased to be a highway at the time alleged in the declaration, he simply puts in issue the fact of its being a highway at the time, without alleging the particular mode by which he intends to show, in proof, that it had before then ceased to be such. The certainty or particularity of pleading is directed, not to the disclosure of the case of a party, but to the informing the court, the jury, and the opponent, of the specific proposition for which he contends; and a scarcely less important object is the bringing the parties to issue on a simple and certain point, avoiding that prolixity and uncertainty which would very probably arise from stating all the steps which lead up to that point" (n).

Defences arising after the commencement of the action may be pleaded,

- (i) *Honess v. Stubbs*, 8 W. R. 188; 487. *Ellison v. Isles*, 11 Ad. & E. 670. ante, pp. 615, 616. (m) 15 & 16 Vict. c. 76, s. 49.
 (k) 15 & 16 Vict. c. 76, ss. 1, 74, 87. (n) *Williams v. Wilcoz*, 8 Ad. & E.
 (l) *Webber v. Sparkes*, 10 M. & W. 333.

together with pleas of defences arising before the commencement of the action, but the plaintiff may confess such plea, and become entitled to the costs of the cause up to the time of pleading such plea. The rule does not apply to the case of a plea pleaded by one or more only out of several defendants (o). Any defence arising after the commencement of the action must be pleaded according to the fact, without any formal commencement or conclusion; any plea which does not state whether the defence therein set up arose before or after action, will be deemed to be a plea of matter arising before action (p).

Payment of money into court by way of compensation or amends.—By 15 & 16 Vict. c. 76, it is enacted (s. 70), that it shall be lawful for the defendant in all actions (except actions for assault and battery (q), false imprisonment, libel, slander (r), malicious arrest or prosecution, criminal conversation, or debauching the plaintiff's daughter or servant), and by leave of the court or a judge, upon such terms as they or he may think fit, for one or more of several defendants to pay into court a sum of money by way of compensation or amends, and such payment is to be pleaded, as near as may be, in the form given by s. 71 of the statute. The plaintiff may reply to the plea by accepting the sum paid into court in full satisfaction and discharge of the cause of action in respect of which it has been paid in, and is at liberty, in that case, to tax his costs, and, in case of non-payment thereof within forty-eight hours, to sign judgment for such costs; or the plaintiff may reply that the sum paid into court is not enough to satisfy the claim of the plaintiff in respect of the matter to which the plea is pleaded; and, in the event of an issue thereon being found for the defendant, the defendant is entitled to judgment and his costs of suit (s).

Of the plea of infancy in actions ex delicto.—A plea of infancy constitutes no defence, as we have seen, to an action for an assault or false imprisonment, or to an action of libel and slander, or for seduction; but it is an answer to an action for deceit, and to actions of tort founded on contract, such as an action for a false and fraudulent representation by an infant that he was of full age, whereby the plaintiff was induced to contract with him; for if such an action was maintainable, all the pleas of infancy would be taken away, as such affirmations are in every contract (t).

(o) Reg. Gen. 16 Vict. 1 Ell. & Bl. app.

(p) 15 & 16 Vict. c. 76, s. 68.

(q) In trespass for breaking and entering the plaintiff's house, and assaulting his son, whereby the plaintiff lost his son's services, it was held that the defendant might pay money into court. *Newton v. Holford*, 6 Q. B. 921, *Anton*

v. Perkes, 15 M. & W. 385.

(r) As to making an apology and paying money into court in cases of libel and slander, see ante, pp. 614, 615.

(s) As to the effect of a payment of money into court in actions of tort, see post, s. 2.

(t) *Johnson v. Pye*, 1 Sid. 258. *Liv. Adm. Loan Ass. v. Fairhurst*, 9 Exch. 430.

Of the plea of accord and satisfaction.—Whenever the plaintiff has consented to receive, and has actually received, satisfaction and recompense for the injury he has sustained, the cause of action is discharged, although the satisfaction and recompense were not one-hundredth part of the value of his loss; for, by his own accord and agreement, the injury is dispensed with, and in all actions in which nothing but amends are to be recovered in damages, there a concord carried into execution is a good plea (*u*). The ordinary form of plea of accord and satisfaction is to the effect that, after the accrual of the cause of action, and before the commencement of the suit, the defendant delivered to the plaintiff, and the plaintiff accepted from the defendant, certain goods and chattels, or monies, or securities for money, &c., specifying the nature and character of the things delivered in full satisfaction and discharge of the cause of action, and of all damages sustained therefrom by the defendant.

Either money or chattels, railway bonds or negotiable securities, or an estate or interest in land, may be given, granted, or surrendered and accepted by way of compensation and amends for the damages that may have been sustained. If goods of the defendant are in the hands of the plaintiff, and it is agreed between the plaintiff and defendant that the plaintiff shall retain these goods as his own property, in satisfaction and discharge of the cause of action, and the goods are accordingly retained and accepted by the plaintiff in satisfaction, &c., this is a valid accord executed, and is pleadable in bar of an action (*x*). But the delivery and acceptance of a man's own goods and chattels constitute no satisfaction. Thus, in an action of trespass against a defendant in respect of an entry by him upon the plaintiff's land, the defendant said that after the entry there was an accord between them that the plaintiff should re-enter into the same land, and should enjoy it without interruption by the defendant, and that the defendant should deliver to the plaintiff all the title-deeds concerning the said land; that the plaintiff had re-entered, and that the defendant had delivered the title-deeds; and it was held that this was no answer, for it must be intended that the title-deeds were the plaintiff's own title-deeds, and then to deliver him his own deeds, and put him in possession of his own land, was no satisfaction of the wrong done before in keeping him out; but it was admitted, that if the defendant had shown any title in himself to the possession of the deeds, then his delivering them up would have been a good bar to the action (*y*).

The meaning of an accord and satisfaction is, that there has been an agreement for something to be done in satisfaction and discharge of

(*u*) *Andrew v. Boughey*, Dyer, 75 b.

(*x*) *Jones v. Sawkins*, 5 C. B. 142.

(*y*) Bro. Abr. ACCORD, 1.

the cause of action, and that the agreement has been completely performed, so that there is a total extinguishment of the original cause of action. The plea, therefore, must set forth an accord executed, showing a complete performance by the defendant of the substituted contract (*z*). Where the defendant had slandered the plaintiff, and after the utterance of the slander the plaintiff and defendant met, and it was agreed that certain letters and documents in the handwriting of the plaintiff, in the possession of the defendant, containing certain proofs against the plaintiff of the truth of the charges made by the defendant, should be burnt, and that no action should be brought, and the letters were burnt, but the plaintiff, nevertheless, brought an action, it was held that the accord executed was a bar to the action (*a*).

Plea of the pendency of another action for the same wrong.—"The law abhors multiplicity of actions, and therefore, whenever it appears upon record that the plaintiff has sued out two writs against the same defendant for the same thing, the second writ shall abate" (*b*). Therefore, in an action of trespass for a horse, it is a good plea in abatement that another action is pending for the same trespass, whether the action be in the same court or in another and different court of co-ordinate jurisdiction (*c*). But the pendency of a suit in an inferior court or in a foreign court (*d*) cannot be pleaded to an action in one of the courts of Westminster for the recovery of the same demand, and if the two suits are in their nature different, if the proceeding in one is in rem and in the other in personam, the pendency of the one cannot be pleaded in suspension of the other (*e*). If a plaintiff sues both at law and in equity for the same cause of action, he may be compelled to elect in which suit he will proceed (*f*).

The court in many cases will relieve on motion where different actions are brought for the same cause, instead of putting the party to plead. Thus, where compensation in damages has been claimed for a trespass committed by several persons, and full compensation in damages has been received from one of the co-trespassers, the court will interfere summarily to prevent the plaintiff from seeking the same compensation a second time from another co-trespasser; but where the injury done is an injury to character from the publication of a libel, the court will not interfere in a summary way to prevent the continuance of proceedings against the publisher of the libel, on the ground that damages have been recovered by the plaintiff from another publisher of the same libel, as the nature and extent

(*z*) *Gabriel v. Dresser*, 15 C. B. 622.

(*a*) *Lane v. Applegate*, 1 Stark. 97.

(*b*) Bac. Abr. ABATEMENT, M.

(*c*) Lev. Ent. 54. *Sperry's case*, 5 Co. 62 a; Com. Dig. ABATEMENT, H. 24.

(*d*) *Ostell v. Lepage*, 16 Jur. 404.

(*e*) *Harmer v. Bell*, 7 Moore, P. C. 281.

(*f*) *Simpson v. Sadd*, 24 Law, J., C. P. 156.

of the injury in each particular case depend upon the extent of the circulation of the libel (*g*).

Of the plea of judgment recovered.—Whenever judgment has been recovered in an action of tort, the judgment, if pleaded, is a bar to any subsequent action for the same wrong; “for you shall not bring the same cause of action twice to a final determination; nemo debet bis vexari pro eadem causâ: and what is the same cause of action is, where the same evidence will support both actions” (*h*). In an action for slander, you cannot have an action twice over against the same person for the utterance of the same words on the same occasion, but every fresh utterance and publication of the slander create a fresh cause of action, so that you may have two actions for words spoken at different times, conveying distinct imputations upon the plaintiff; and judgment recovered in the first action would be no bar to the second action. Every plea alleging that the plaintiff brought a prior action against the defendant for the same wrong, and recovered judgment therein (*i*), must contain in the margin thereof a statement of the date of such judgment; and, if such judgment be in a court of record, of the number of the roll, if any, on which the proceedings are entered. In default of such statement, the plaintiff will be at liberty to sign judgment as for want of a plea; and in case the same be falsely stated by the defendant, the plaintiff, on producing a certificate from the proper officer or person having the custody of the records or proceedings of the court where such judgment is alleged to have been recovered, that there is no such record or entry of a judgment as therein stated, is at liberty to sign judgment as for want of a plea (*k*).

If the record, when produced, shows on the face of it that the cause of action, in the second suit, is not the same as that for which judgment was recovered in the former action, the record at once disproves the plea, and the plaintiff will be entitled to a verdict (*l*). But the varying of the form of the claim, where the claim is substantially the same, will not be allowed to defeat the operation of the rule. Therefore, where a servant in husbandry, being hired for a quarter of a year, and having entered the service, was discharged therefrom before the end of the quarter, and then sued her master in the County Court for discharging her without reasonable cause, and her master obtained a verdict on the ground that he had good cause for dismissing her, and the servant then, after the quarter had elapsed, took out a summons before justices against her master to recover the quarter's wages, it was held that the question before the

(*g*) *Martin v. Kennedy*, 2 B. & P. 69.

(*h*) *Kitchen v. Campbell*, 3 Wils. 304;
2 W. Bl. 827.

(*i*) *Baslam v. Lumley*, 3 C. & P. 489 n.

(*k*) Reg. Gen. Hil. T. 16 Vict. 10; 1
Ell. & Bl. app. 3.

(*l*) *Wadsworth v. Bentley*, 23 Law, J.,
Q. B. 3.

justices under this summons was substantially the same as that which had been adjudicated upon by the County Court, viz. whether the dismissal was wrongful; that the decision in the County Court was conclusive between the parties, and could not be reviewed by the justices. "It was open to the justices," observes Cockburn, C. J., "to inquire whether the County Court had jurisdiction, and whether the judge had determined that the discharge of the respondent was rightful; but as soon as they had ascertained both those facts in the affirmative, they were bound by law to treat the decision of the County Court as conclusive between the parties, and not to allow the dispute as to the discharge being wrongful to be reopened." (*m*).

The recovering from a servant of damages for leaving the service of his master, has been held to be a bar to a second action against another party for seducing the servant away from his master's service, because the damage for the loss of service was compensated for in the first action (*n*).

If two commit a joint tort, the judgment against one is of itself, without execution, a sufficient bar to an action against the other for the same cause (*o*); and whenever the cause of action in the two suits is identical, the recovery of judgment in the one is a bar to the other (*p*). A judgment, therefore, in a county court, is a bar to an action on the same subject-matter in any other court (*q*). But a judgment obtained upon some technical collateral point, not touching the substantial cause of action between the parties, is no bar to a subsequent action. If the plaintiff makes a mistake in his declaration, and the defendant demurs, and judgment is given for him, the plaintiff may rectify the mistake in a second action (*r*). "Where the declaration in the second action is framed in such a manner that the causes of action may be the same as those in the first suit, it is incumbent on the party bringing the second action to show that they are not the same" (*s*). "The plaintiff who brings a second action, ought not to leave it to nice investigation to see whether the two causes of action be the same; he ought to show, beyond all controversy, that the second is a different cause of action from the first." Where there are two distinct demands not in the least blended together, and the plaintiff has failed through inadvertence in proving one of them, he may maintain a second action for the other (*t*). Whenever the same point was

(*m*) *Routledge v. Hislop*, 29 Law, J., M. C. 90.

(*n*) *Bird v. Randall*, 3 Burr. 134b.

(*o*) *King v. Hoare*, 13 M. & W. 504-506.

(*p*) *Slade's case*, 4 Co. 94 b. *Phillips v. Berryman*, 3 Doug. 288.

(*q*) *Austin v. Mills*, 9 Exch. 288; 29 Law, J., Exch. 42.

(*r*) *Lampen v. Kedgevin*, 1 Mod. 207.

(*s*) *Bagot, Ltd. v. Williams*, 3 B. & C. 239.

(*t*) *Seddon v. Tutop*, 6 T. R. 609.

not in issue in the prior action, the judgment in such prior action can have no effect upon the second action (u); but when the pleading and the state of the record are such that the plaintiff might, if he had thought fit, have recovered his whole demand in the first action, he cannot afterwards be allowed to recover it in a second action.

Recovery of judgment upon a contract with insurers against loss is, as we have seen, no bar to an action against a wrongdoer who has occasioned the loss, although the insurer has received a full indemnity (x).

A plea of the recovery of judgment and damages in an action for a false imprisonment upon a charge of felony, is no answer to an action for a malicious prosecution for the same felony. "It is altogether," observes Parke, B., "a different cause of action. The taking a man up on a charge of felony, is distinct from the act of going before a grand jury and falsely and maliciously taking an oath to get a bill found against him for the same felony, and then going before a petty jury and trying to induce them to find him guilty (y).

Where the second action is founded upon some special damage flowing from the original wrong, a plea of judgment recovered in an action for such original wrong, will be a bar to such second action, unless the special damage alleged in the declaration be shown to constitute a new cause of action. Thus, when the plaintiff in his declaration alleged that the defendant beat the plaintiff's head against the ground, and that the plaintiff brought an action of assault and battery for that and recovered damages, and that since the recovery of such damages by reason of the same battery, a piece of the plaintiff's skull had come out, and the defendant pleaded in bar the recovery mentioned in the declaration, and averred it to be for the same assault and battery, and the plaintiff demurred, and it was urged that this subsequent damage was a new matter which could not be given in evidence in the first action, when it was not known, it was held that the recovery of damages in the first action was an absolute bar to any subsequent action for the same battery (z).

Continuing injuries — Judgment recovered.—But where the injury is of a continuing nature, the bringing of an action and the recovery of damages for the perpetration of the original wrong does not prevent the injured party from bringing a fresh action for the continuance of the injury. Thus, if a building has been wrongfully erected upon the plaintiff's land, and the plaintiff has brought an action and recovered damages for the trespass, he is not thereby precluded from bringing a fresh action and recovering fresh damages for the continuance of the erection. If the

(u) *Carter v. James*, 13 M. & W. 137.

(x) *Yates v. Whyte*, 4 Bing. N. C. 282; ante, pp. 133, 265.

(y) *Guest v. Warren*, 9 Exch. 379; 23 Law, J., Exch. 121.

(z) *Fetter v. Beale*, 1 Salk. 11.

defendant, for example, has thrown a heap of stones on the land of the plaintiff, and leaves them there, the defendant is responsible in trespass from day to day until they are removed. Thus, where the trustees of a turnpike road built buttresses on the land of the plaintiff to support the road, and the plaintiff thereupon sued them and their workmen in trespass for such erection, and accepted money paid into court in full satisfaction of the trespass, it was held, that after notice to the defendants to remove the buttresses, and a refusal to do so, the plaintiff might bring another action of trespass against them for keeping and continuing the buttresses on the land, to which the former recovery was no bar (*a*).

Where an action was brought against the defendant for obstructing an ancient window of the plaintiff's house, by keeping and continuing a certain roof before then wrongfully erected adjoining the said house, to the injury of the plaintiff's reversion, and a former judgment recovered by the plaintiff against the defendant for the same grievance was pleaded in bar, and the plaintiff replied that the grievances were not the same, and issue was joined thereupon, and it appeared that on a former trial between the same parties, of an action for an injury to the plaintiff's reversion in the same premises by erecting and keeping up the roof, the plaintiff recovered damages, it was held that such recovery was no bar to the second action; for if the erection of the roof in the first instance was an injury to the reversion, the continuance of it subsequently to the first action was a fresh injury to the reversioner, in respect of which a fresh action was maintainable (*b*).

But where the injury is not of a continuing nature, and the damages which flow therefrom, when they accrue have accrued once for all, then the recovery of judgment in a previous action is, as we have seen, a good bar. Thus, if a man has dug a pit, or made a trench in another's land, and an action has been brought and damages have been recovered for the injury, such recovery of damages is a complete satisfaction for the wrong done in cutting into the plaintiff's land, and no other action is maintainable (*c*); but where a man digs a trench or deepens a ditch in his own land, which has the effect of injuriously diverting water from his neighbour's stream, or of diminishing the supply of water to a neighbour's mill, then there is a continuing injury so long as the trench remains open, and the ditch deepened and the diverted water is allowed to run through it to the injury of the neighbouring proprietor.

When both landlord and tenant are responsible for the injury, the plaintiff may proceed against either at his election; but he can have but

(*a*) *Holmes v. Wilson*, 10 Ad. & E. 503. Ad. 97.

(*b*) *Shadwell v. Hutchinson*, 2 B. &

(*c*) *Olegg v. Dearden*, 12 Q. B. 591.

one satisfaction for the same wrong, and having sued and recovered judgment against one, he cannot recover against the other (*d*).

Effect of the recovery of judgment in actions for the conversion of property.—We have already seen, that by a recovery of judgment in an action for the conversion of property the plaintiff's right of property in the things converted is barred, and the property vests in the defendant in the action (*e*). The property in the goods is changed by relation from the time of the conversion. Some of the authorities seem to lay it down that it is not the recovery only, but the recovery coupled with the payment of the damages that changes the property; but it has been decided that the right of property in the things converted is entirely altered by the judgment, whether the damages are paid or not. "It is the judgment," observes Jervis, C. J., "that disposes of the matter, and not the payment. If, therefore, two persons jointly convert goods, and one of them receives the proceeds, you cannot, after a recovery against one in trover, have an action against the other for the same conversion; or an action for money had and received, to recover the value of the goods for which a judgment has already passed in the former action" (*f*).

Pleas of the bankruptcy or insolvency of the plaintiff.—By s. 142 of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), it is enacted, that the bankruptcy or insolvency of the plaintiff in an action shall not be pleaded in bar to such action, unless the assignees shall decline to continue and give security for the costs thereof, upon a judge's order to be obtained for that purpose, within such reasonable time as the judge may order, but the proceedings may be stayed until such election is made; and in case the assignees neglect or refuse to continue the action and give such security within the time limited by the order, the defendant may, within eight days after such neglect or refusal, plead the bankruptcy.

Of pleas of the Statute of Limitations.—By 21 Jac. 1, c. 16, s. 3, it is enacted, that all actions of trespass, quare clausum fregit, all actions of trespass detinue, trover and replevin, for taking away of goods and cattle, all actions upon the case, and all actions of assault, menace, battery, wounding, and imprisonment, or any of them, shall be commenced within the time and limitation thereafter expressed, and not after; that is to say, the said actions upon the case other than for slander, and the said actions for trespass detinue, and replevin for goods or cattle, and the said actions of trespass quare clausum fregit, within six years next after the cause of such actions or suit, and not after; and the said actions of trespass, of

(*d*) *Roswell v. Prior*, 2 Salk. 480; 12 Mod. 636. *Brent v. Haddon*, Cro. Jac. 555.

(*e*) *Cooper v. Shepherd*, 3 C. B. 272;

Holroyd, J., 3 B. & C. 206.

(*f*) *Buckland v. Johnson*, 15 C. B. 161; 23 Law, J., C. P. 204. *Brown v. Wootton*, Cro. Jac. 79.

assault, battery, wounding, imprisonment, or any of them, within four years next after the cause of such actions or suit, and not after; and the said actions upon the case for words within two years next after the words spoken, and not after. But (s. 4) if in any of the said actions judgment be given for the plaintiff, and the same be reversed by error, or a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment the judgment be given against the plaintiff, that he take nothing by his plaint or writ, the plaintiff, his heirs, executors, &c. may commence a new action within a year after such judgment reversed, or given against the plaintiff, and not after. And by 19 & 20 Vict. c. 97, s. 10, absence beyond seas, or imprisonment at the time of the accrual of the cause of action, is no longer to have the effect of extending the period of limitation (g).

Of the commencement of the period of limitation.—The time of limitation begins to run from the accrual of the cause of action; and when an act has been done which is lawful in itself, but becomes unlawful only in case it causes damage and injury to another, the time of limitation will run, not from the period of the doing of the lawful act, but from the time of the accrual of the damage, and the consequent conversion of the act which was lawful in its inception into a tort. Thus, where one person is possessed of the surface of land, and another is owner of the subsoil, and the owner of the subsoil excavates therein for minerals, without causing any immediate apparent injury to the surface, but damage ultimately ensues, and the surface subsides, the time of limitation will begin to run from the time when the damage manifested itself, and not from the period of the making of the excavation (h). Whenever one person does anything or permits anything to be done on his own land which causes injury to his neighbour, and the injury is of a continuing nature, the cause of action, as we have seen, continues, and is renewed de die in diem as long as the cause of the continuing damage is allowed to continue. If a man, by digging and constructing basins and canals on his own land, causes a stream of water to flow against his neighbour's wall, and gradually to undermine it, so that at last the wall falls, the period of limitation runs from the time of the falling of the wall, and not from the time of the construction of the basins and canals (i). And if a man, by digging on his own land, wrongfully lays open the foundations of his neighbour's wall, and causes them to be gradually weakened by the effect of flowing water, rain, and frost, so that

(g) *Cornill v. Hudson*, 27 Law, J., Q. B. 8. As to the limitation of actions by the personal representatives of deceased parties whose death has been occasioned by negligence, see ante, pp. 254, 255; also of actions against judges, and officers,

and persons acting under statutory authority, see ante, pp. 411–413, 538, 539, 559, 560.

(h) *Bonomi v. Backhouse*, 28 Law, J., Q. B. 378.

(i) *Gillon v. Boddington*, R. & M. 161.

at last the wall falls, the time of limitation runs from the time of the falling of the wall, and not from the time of the excavation of the soil (*k*).

Where an action is brought against a justice of the peace for a false and malicious imprisonment (ante, p. 536) every continuance of the imprisonment *de die in diem* is, in point of law, a new imprisonment, and, therefore, the time of limitation runs from the last day of such imprisonment, and not from the time of the making of the warrant (*l*).

As a general rule, the period of limitation runs from the time of the commission of the wrongful act, and not from the time of the knowledge of that act by the plaintiff, there being no proof of any fraud practised by the defendant in order to conceal that knowledge from the plaintiff (*m*).

In actions for negligence or for a breach of duty, the cause of action accrues at the time of the occurrence of the act of negligence or the breach of duty, and not from the period of its discovery by the plaintiff. If, therefore, an attorney or agent has been guilty of a neglect of duty, and the injurious consequences thereof do not come to the knowledge of the principal until after the lapse of six years from the occurrence of the wrongful act, the right of action of the principal is barred (*n*).

Extension of the period of limitation in certain cases.—When the action abates by the death of the plaintiff, or is abated without default of the plaintiff by the act of God, and the period of limitation has run out before the commencement of a fresh action, the courts have indulged the plaintiff with the liberty of suing out a new writ, so that he did it within a reasonably recent period. One mode of measuring the time was with reference to the time it would occupy in getting to the place where a new writ was to be obtained. Hence the writ got the name of a writ of journey's accounts. But there was no exact limit of time to govern the court in saying what was a reasonable time in getting the writ, and the question is, whether the action is, under the particular circumstances of the case, brought within a reasonable period after the expiration of the time of limitation (*o*).

Equitable defences.—By 17 & 18 Vict. c. 125, s. 83, it is enacted, that it shall be lawful for the defendant or plaintiff in replevin in any case in any of the superior courts in which, if judgment were obtained, he would be entitled to relief against such judgment on equitable grounds, to plead

(*k*) *Roberts v. Read*, 16 East. 217.

(*l*) *Hardy v. Ryle*, 9 B. & C. 608.

Massy v. Johnson, 12 East. 68.

(*m*) *Granger v. George*, 7 D. & R. 730;

5 B. & C. 149.

(*n*) *Howell v. Young*, 5 B. & C. 265.

(*o*) *Curlewis v. Mornington*, 27 Law, J., Q. B. 439.

the facts which entitle him to such relief by way of defence, and these courts are thereby empowered to receive such defence by way of plea, provided that such plea shall begin with the words "for defence on equitable grounds," or words to the like effect. Any such matter (s. 84) which, if it arose before or during the time for pleading, would be an answer to the action by way of plea, may, if it arise after the lapse of the period during which it could be pleaded, be set up by way of *audita querelâ*. The plaintiff may reply (s. 85) in answer to any plea of the defendant, facts which avoid such plea upon equitable grounds; provided that such replication shall begin with the words, "for replication on equitable grounds," or words to the like effect. But it is provided (s. 86) that in case it shall appear to the court, or any judge thereof, that any such equitable plea, or equitable replication, cannot be dealt with by a court of law so as to do justice between the parties, it shall be lawful for such court or judge to order the same to be struck out (p).

Joinder of issue.—Either party may plead in answer to the plea or subsequent pleading of his adversary that he joins issue thereon, and such joinder of issue operates as a denial of the substance of the plea or other subsequent pleading and an issue thereon; and in all cases where the plaintiff's pleading is in denial of the pleading of the defendant, or some part of it, the plaintiff may add a joinder of issue for the defendant (q). The object of this new form of replication, "the plaintiff joins issue on each of the pleas," merely enables a party in a compendious manner to traverse all those allegations in a plea which he could have traversed before; but such matters as, before the Common Law Procedure Act, must have been replied specially, must still be so replied; and all matters which must have been pleaded by way of new assignment, must still be so pleaded (r).

Pleadings construed distributively.—Pleas of payment and set-off, and all other pleadings capable of being construed distributively, are to be taken distributively; and if issue is taken thereon, and so much thereof as shall be sufficient answer to part of the causes of action proved shall be found true by a jury, a verdict is to pass for the defendant in respect of so much of the causes of action as shall be answered, and for the plaintiff in respect of so much of the causes of action as shall not be answered (s).

New assignments.—"Where the defendant answers what may reasonably be considered the gist of the trespass described in the declaration, it

(p) 17 & 18 Vict. c. 125, ss. 84-87.

(q) 15 & 16 Vict. c. 70, ss. 76-79.

(r) *Glover v. Dixon*, 0 Exch. 159.

(s) 15 & 16 Vict. c. 76, s. 75. Reg. Gen. Hil. Term. 16 Vict. No. 62; 1 Ell. & Bl. app. xiii.

will be presumed that the action is carried on only for that which the defendant has thus attempted to justify, unless the plaintiff intimates by a new assignment that the defendant has overlooked a part of the grievances he complains of, or has altogether misapprehended his meaning" (t). Where the defendant has committed several trespasses, either upon the person, goods, or lands of another, some of which are justifiable and others not, and the action is brought for those trespasses which are not justifiable, but the defendant by his plea answers those only which are justifiable, the plaintiff should by his replication make a new assignment, showing the trespasses for which the plaintiff proceeds (u). And where the declaration is general, and the subject-matter thereof divisible, and the plea apparently answers the whole cause of action, but in reality answers only a part, the plaintiff must new assign as to the part not really answered. Thus, where the plaintiff complained that the defendant had entered upon the plaintiff's close and cut down one hundred yards of railing, and the defendant pleaded a right of way over the close, and justified the cutting down of the rails, because they obstructed him in the exercise of his right of way, and the plaintiff merely traversed the allegation that the rails were in the highway, and it appeared that some of the rails cut were there, it was held that, upon this issue, both parties must be taken to have agreed that those were the rails in question, and that if the plaintiff meant to go for rails cut down on other parts of his close, he should have so stated by a new assignment (x).

The object of a new assignment, therefore, is to correct a mistake occasioned by the generality of the declaration, and is in the nature of a replication to the defendant's plea; or it may be more properly considered as an explanation of the declaration, setting forth the true ground of complaint, as being different from that which is covered by the plea (y).

By 15 & 16 Vict. c. 76, ss. 87, 88, it is enacted, that one new assignment only shall be pleaded to any number of pleas to the same cause of action; and such new assignment shall be consistent with, and confined by, the particulars delivered in the action, if any, and shall state that the plaintiff proceeds for causes of action different from all those which the pleas profess to justify, or for an excess over and above what all the defences set up in such pleas justify, or both; and no plea which has

(t) *Monprivatt v. Smith*, 2 Campb. 176. As to new assignment, see the note to *Taylor v. Cole*, 1 Smith's L. C. 103, 4th edn. Chitty jun., on Pleading, by Pearson, 767-769. *Lambert v. Hodgson*, 1 Bing. 319.

(u) See the notes to *Greene v. Jones*, 1

Saund. 209. *Robertson v. Gantlett*, 10 M. & W. 297.

(x) *Bracegirdle v. Peacock*, 8 Q. B. 180.

(y) Stephens on Pleading, pp. 257-261, 5th edn. *Ellison v. Isles*, 11 Ad. & E. 671.

already been pleaded to the declaration shall (s. 88) be pleaded to such new assignment, except a plea in denial, unless by leave of the court or a judge; and such leave shall only be granted upon satisfactory proof that the repetition of such plea is essential to a trial on the merits (z).

There can be no new assignment for a cause of action not included in the declaration. A new assignment, therefore, of an entirely new cause of action is bad. The object of it is to inform the defendant that there is another cause of action included in the declaration beyond that which the defendant has answered by his plea, and that the plaintiff means to rely upon the last-named cause of action, and not the cause of action to which the plea is pleaded (a). A new assignment admits that the declaration stands well answered by the plea. If, therefore, the plaintiff fails to take issue on the plea, but new assigns a distinct substantive trespass, and fails to prove it, the defendant will be entitled to a verdict. Where in trespass the defendant pleaded that the locus in quo was part of a common which had been allotted to him, to which the plaintiff new assigned that the trespass complained of was in another place, and upon its being admitted in the opening of the plaintiff's counsel to the jury that the trespass was in the same place, but that the defendant had no title to it, the chief justice said that was decisive against the plaintiff, and that the defendant was entitled to a verdict (b).

Demurrers.—Either party may object by demurrer to the pleading of the opposite party on the ground that such pleading does not set forth sufficient ground of action, defence, or reply, as the case may be; and where issue is joined on such demurrer, the court must proceed and give judgment according as the very right of the cause and matter in law shall appear to them, without regarding any imperfection, omission, or defect in form; and no pleading is to be deemed insufficient for any defect which, before the passing of the Common Law Procedure Act, 1852, could only be objected to by special demurrer (c). A form of demurrer is given in the last-named statute, and in the margin thereof some substantial matter of law intended to be argued is to be stated, and if the demurrer is delivered without such statement, or with a frivolous statement, it may be set aside by the court or a judge, and leave given to sign judgment as for want of a plea (d).

(z) As to forms of new assignments see Schedule B. to the Common Law Procedure Act, 1852, Nos. 56, 56, 57.

(a) *Rogers v. Spence*, 12 Cl. & Fin. 719.

(b) Anon. cited 16 East. 86. *Oakley v. Davis*, ib. 82. *Atkinson v. Matteson*, 2 T. R. 172.

(c) 15 & 16 Vict. c. 76, ss. 49-51.

(d) Ibid. s. 89.

SECTION II.

PROCEEDINGS AT THE TRIAL.

Right to begin.—The fifteen judges have made a resolution that the plaintiff shall begin at the trial in all actions for personal injuries, libel, and slander, although the general issue may not be pleaded, and the affirmative be on the defendant (*e*). And it is now held that the plaintiff should bring his own cause of complaint before the court and jury in every case where he has anything to prove, either as to the facts necessary for his obtaining a verdict, or as to the amount of damages to which he conceives the proof of such facts may entitle him (*f*).

Under the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 18, if counsel announces his intention not to adduce evidence, he cannot afterwards do so (*g*).

Effect of payment of money into court in actions of tort.—“Formerly it was supposed by the profession that by payment of money into court in an action of tort the defendant admitted the cause of action sued for, and that as the plaintiff was at liberty to prove any cause of action he pleased, consistent with the declaration, it was the duty of the defendant to take care, by the form of his pleading or by obtaining particulars on summons, that his admission by payment into court was not used to his prejudice; but of late years this rule has been greatly modified, and it has been held that where in an action of tort the declaration is general and unspecific, the payment of money into court, though it admits a cause of action, does not admit the cause of action sued for, and that the plaintiff must give evidence of the cause of action sued for before he can have larger damages than the amount paid into court. On the other hand, if the declaration is specific, so that nothing would be due to the plaintiff from the defendant, unless the defendant admitted the particular claim made by the declaration, the payment of money into court admits the cause of action sued for, and so stated in the declaration. If the breach is single, and the damages entire, then, of course, it becomes under such circumstances a mere question of damages; but if the damages be compounded of several things, although the payment of money into court

(*e*) *Carter v. Jones*, 6 C. & P. 64; 1 Mood. & Rob. 281.

(*f*) *Mercer v. Whall*, 5 Q. B. 458.

Taylor on Evidence, pp. 344–347, 3d ed.

(*g*) *Darby v. Ouseley*, 1 H. & N. 8.

may, from the form of declaration, admit the particular cause of action sued for, still it may be necessary to prove the cause of action, with a view to the damages" (h).

Competency of plaintiffs and defendants to give evidence on their own behalf.—By the Amendment of Evidence Acts (14 & 15 Vict. c. 99, s. 2, and 16 & 17 Vict. c. 83), it is enacted, that on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any court of justice, or before any person having by law, or by consent of parties, authority to hear, receive, and examine evidence, the parties thereto, and the persons in whose behalf any such suit, action, or other proceeding may be brought or defended, and the husbands and wives of the parties thereto, and of the persons in whose behalf any such suit, action, or proceeding may be brought, or instituted, or opposed, or defended (i), shall, except as thereafter excepted, be competent and compellable to give evidence, either *vivâ voce* or by deposition, according to the practice of the court, on behalf of either or any of the parties to the said suit, action, or other proceeding. But nothing therein contained shall (s. 3) render any person who in any criminal proceeding is charged with the commission of any indictable offence, or any offence punishable on summary conviction, competent or compellable to give evidence for or against himself or herself, or shall render any person compellable to answer any question tending to criminate himself or herself, or shall render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband in any criminal proceeding, or in any proceeding instituted in consequence of adultery. And no husband shall (s. 3) be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage (k).

Proof on the part of the plaintiff.—When affirmative pleas of justification are put upon the record with the general issue, the plaintiff's counsel may, if he pleases, not only prove the facts of the declaration, but also may in the first instance, and before the defendant's case is gone into at all, go into any evidence which tends to destroy the effect of the justifications by way of anticipating the defence; or he may, if he pleases, content himself with proving the fact on the general issue, and then close his case, leaving the defendant to make out his justifications as he can, and afterwards go into evidence, in reply, as to the justifications.

(h) Jervis, C. J., *Perren v. Monm. Rail. Co.*, 11 C. B. 865.

(i) 16 & 17 Vict. c. 83, s. 1.

(k) As to evidence of married women in the Divorce Court, see *ante*, pp. 686, 692.

But if the plaintiff's counsel, knowing by the pleas what the defence is to be, close their case, and trust to evidence in reply, they are to be restricted to such evidence as goes exactly to answer the case proved, or attempted to be proved, by the defendant in support of the justifications, and they cannot be allowed to go beyond it (l).

If evidence which ought to have been specially pleaded is allowed by a plaintiff to be introduced without objection, the court will not afterwards grant a new trial on the ground that he was taken by surprise.

Proof on the part of a plaintiff who sues for damages resulting from the doing of things prohibited by statute.—Where an act of parliament prohibits the doing of a particular act affecting the public, no person has a right of action against another merely because he has done the prohibited act. The plaintiff must, therefore, prove some special damage, some peculiar injury beyond that which he may be supposed to sustain in common with the rest of the Queen's subjects by an infringement of the law (m).

Proof of acts of parliament — Publick and private statutes.—A publick act of parliament is proved by the mere production of a volume of the statutes at large, containing the particular act purporting to be printed by the Queen's printer. Originally private acts of parliament were required to be proved by a copy examined with the parliament roll. Clauses were then inserted declaring that a copy printed by the king's printer should be evidence. It was then objected, that in such cases it was necessary to prove that the act produced was in fact printed by the king's printer, whereupon by 8 & 9 Vict. c. 113, s. 3, it was enacted, that all copies of private and local and personal acts, if purporting to be printed by the Queen's printer, should be admitted as evidence thereof, without proof that such copies were so printed. And now by 13 & 14 Vict. c. 21, s. 7, it is enacted, that every act of parliament made after the then next session of parliament shall be deemed and taken to be a publick act, and shall be judicially taken notice of as such, unless the contrary be expressly provided and declared by such act (n).

Proof of journals of parliament and of royal proclamations.—By 8 & 9 Vict. c. 113, s. 3, it is enacted, that all copies of the journals of either House of Parliament and of royal proclamations, purporting to be printed by the printers to the Crown, or by the printers to either House of Parliament, shall be admitted as evidence, without proof that such copies were so printed.

Proof of criminal proceedings.—By the Law of Evidence Amendment Act (14 & 15 Vict. c. 99), reciting that it is expedient, as far as possible,

(l) *Pierpoint v. Shapland*, 1 C. & P. 447. *Rail. Co.*, 1 Exch. 877.

(n) *Woodward v. Cotton*, 1 Cr. M. & R. 44.

(m) *Chamberlaine v. Chester & Birk. &c.*

to reduce the expense attendant upon the proof of criminal proceedings, it is enacted (s. 18), that whenever, in any proceeding whatever, it may be necessary to prove the trial and conviction or acquittal of any person charged with any indictable offence, it shall not be necessary to produce the record of the conviction or acquittal of such person, or a copy thereof, but it shall be sufficient that it be certified, on purport to be certified, under the hand of the clerk of the court, or other officer having the custody of the records of the court where such conviction or acquittal took place, or by the deputy of such clerk or other officer, that the paper produced is a copy of the record of the indictment, trial, conviction, and judgment of acquittal, as the case may be, omitting the formal parts thereof.

Proof of records and proceedings in the superior courts.—Records of the superior courts may be proved by an examined copy. "The evidence," observes Lord Ellenborough, "must be launched by proving that the original came either from the proper person, or out of the proper place of custody. This cannot be shown by any light reflected from the record itself, which may have been improperly placed where it was found. Nothing can be borrowed ex visceribus iudicii, till the original be proved to have come from the proper custody" (o). If after a copy has been made of the original record the clerk, or person who has the custody of it, reads it aloud, and the witness who produces the copy examines it by the light of such reading, this is sufficient, and it matters not whether the officer or the witness reads the record. It is good either way (p).

Proof of a judge's order.—The statute 8 & 9 Vict. c. 113, s. 2, enacts, as we have seen, that all judges, justices, &c., and judicial officers, shall thenceforth take judicial notice of the signature of any of the equity or common-law judges of the superior courts at Westminster, provided such signature be attached or appended to any decree, order, certificate, or other judicial or official document.

Proof of records filed in the Petty-Bag Office, or common-law side of the Court of Chancery.—By 12 & 13 Vict. c. 109, s. 18, it is enacted, that every office copy issued from the Petty-Bag Office shall be sealed with the Chancery common-law seal for the time being; and every document sealed with such seal, and purporting to be a copy of any record or other document of any description, shall be deemed to be a true copy of such record or other document, and shall, without further proof, be admissible, and admitted, and received in evidence before either House of Parliament, and before any committee thereof, and by and before all courts, judges, justices, officers, and other persons whomsoever, in like manner, and to

(o) *Adamthwaite v. Syngé*, 1 Stark. 183.

(p) *Reid v. Margison*, 1 Campb. 470.
Rolf v. Dart, 2 Taunt. 50.

the same extent and effect, as the original record or other document would or might be admissible, or admitted, or received, if tendered in evidence, as well for the purpose of proving the contents of such record or other document, as also proving such record or other document to be a record or document of or belonging to the said Court of Chancery, but not further or otherwise.

Proof of proceedings before magistrates.—The statute 11 & 12 Vict. c. 42, s. 17, requires, as we have seen, examinations before justices to be taken down in writing, so that oral evidence of the nature and substance of depositions and examinations before magistrates cannot be given in evidence, unless it be shown that the depositions have been lost or destroyed, and that they cannot be produced.

Proof of proceedings in bankruptcy.—Provision is made by the bill now before parliament for amending and consolidating the laws relating to bankrupts for the admission in evidence in all courts of the various orders, writings, and proceedings in bankruptcy, provided they purport to be sealed or signed as therein mentioned.

Proof by sworn or certified copies of books, registers, or original documents.—By the Documentary Evidence Act (8 & 9 Vict. c. 113, s. 1), reciting that it is provided by many statutes that various certificates, official and publick documents, documents and proceedings of corporations, and of joint-stock and other companies, and certified copies of documents, by-laws, entries of registers and other books, shall be receivable in evidence of certain particulars in courts of justice, provided they be respectively authenticated in the manner prescribed by such statutes; it is enacted, that whenever by any act then in force, or thereafter to be in force, any certificate, official or publick document, or document or proceeding of any corporation, or joint-stock or other company, or any certified copy of any document, by law, entry in any register or other book, or of any other proceeding, shall be receivable in evidence of any particular in any court of justice, or before any legal tribunal, or either House of Parliament, or any committee of either House, or in any judicial proceeding, the same shall respectively be admitted in evidence, provided they respectively purport to be sealed or impressed with a stamp, or sealed and signed, or signed alone, as required, or impressed with a stamp and signed, as directed by the respective acts made or to be thereafter made, without any proof of the seal or stamp where a seal or stamp is necessary, or of the signature, or of the official character of the person appearing to have signed the same, and without any further proof thereof, in every case in which the original record could have been received in evidence.

And by 14 & 15 Vict. c. 99, s. 14, it is further enacted, that whenever any book or other document is of such a public nature as to be

admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by means of a copy, any copy thereof or extract therefrom shall be admissible in evidence in any court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is intrusted, which officer is required to furnish such certified copy or extract to any person applying at a reasonable time for the same, and paying a reasonable sum, not exceeding fourteen pence for every folio of ninety words. And if such officer wilfully certifies (s. 15) any document as being a true copy or extract, knowing that the same is not true, he shall be guilty of a misdemeanour, and liable on conviction to imprisonment.

Proof of copies of licenses for keeping, using, or employing stage-carriages.—The statute 5 & 6 Vict. c. 79, s. 10, requires the officers by whom licenses to keep stage-carriages have been granted, to deliver certified copies of such licenses, and of endorsements thereon, and provides that each copy, certified to be a true copy under the hand of one of the commissioners, or of the officer by whom the license was granted, or other authorized officer of stamp duties, shall be received in evidence on proof of the handwriting of the person by whom it is signed; but the statute 8 & 9 Vict. c. 113, s. 1, now dispenses with the proof of handwriting.

Oral evidence of a particular transaction or of particular facts and circumstances, notwithstanding the existence of a written memorial thereof.—“The fact of a conversation or transaction being reduced into writing, furnishes no general principle for excluding oral evidence of the conversation or transaction. Such evidence is by no means necessarily secondary to the writing. Judges take notes of the evidence given on trials, yet the evidence may be proved from recollection, even on an indictment for perjury (q). The exclusion must be founded either on the agreement of the parties or on the requirements of some particular law. When parties, by common consent, reduce into writing the terms of a contract or agreement, then, as between themselves, such writing must be produced, and cannot be contradicted or even added to by oral evidence; for it is a reasonable presumption that, though other things were said or done besides those recorded in the writing, the parties concurred in treating those other things as not essential parts of the contract. But this reasoning does not apply to third parties. There may well be occasions, either civil or criminal, in which others may have an interest in proving what really passed, and there is no reason why

(q) *Rowley's case*, Moody's C. C. R. 111.

they should not be permitted to prove it from the memory of witnesses without producing the writing" (r).

Proof by oral testimony in cases where the law requires a memorandum of the circumstances to be reduced into writing.—"Where matters are required to be reduced into writing by statute, either for the purpose of giving validity to the transaction, or for the purpose of evidence, the writing may be considered the primary evidence, and must be produced. But questions may arise as to the extent to which other evidence is to be excluded, in the determination of which the necessity of the case in some instances, the purposes of the enactment in others, must be looked to. Various statutes require the examinations of witnesses and prisoners to be reduced into writing (ante, pp. 511, 513); but on the trial oral evidence is admissible by way of explanation, or to prove that the party made other statements besides those recorded in writing, otherwise the safety of prisoners and the credit of witnesses would depend on the honesty and accuracy of the clerks who take the examination" (s). It has been held that oral evidence is admissible to add to the examination of a party before a magistrate, though the examination was taken down in writing; and that anything the party may have said as part of his information, beyond what was put into writing, may be proved (t).

Where an examination of a prisoner made by a coroner was inadmissible on account of an irregularity in the mode of taking it, the coroner was allowed to state what the prisoner said on the occasion of his examination (u), for "what a party says is evidence against himself whether another person took it down or not" (x). Where on a preliminary hearing of a case the magistrate's clerk had taken down what a witness said, but neither witness nor magistrate signed it, it was held, that what the witness said might be proved by any one who heard him, without producing the clerk's note (y).

The fact of marriage may, except in certain criminal cases, and cases of adultery, be proved by oral evidence of eye-witnesses of the ceremony, or by oral evidence of general reputation, or of the parties having lived together as man and wife, though the law requires a memorandum of the event to be kept in a public register, which is not produced, nor any office copy or attested extract (z). The fact of birth or baptism, death or burial, may in like manner be proved by oral testimony, though the law

(r) *Jeans v. Wheedon*, 2 Mood. & Rob. 487 n.

(s) 2 Mood. & Rob. 487 n.

(t) *Venafra v. Johnson*, 1 Mood. & Rob. 316. *Rowland v. Ashby*, R. & M. 281. *Harris's case*, Mood. C. C. R. 338.

(u) *Rex v. Reed*, 1 Mood. & Malk. 403.

(x) *Alderson, B., Robinson v. Vaughton*, 8 C. & P. 255.

(y) *Jeans v. Wheedon*, 2 Mood. & Rob. 480.

(z) *St. Devereux v. Much*, 1 W. Bl. 367. *Morris v. Miller*, 1 W. Bl. 632.

requires these events to be recorded in public registers. Inscriptions also on flags and banners, and the contents of a resolution read at a public meeting, may be proved by oral testimony, without producing or giving notice to produce the flags or the resolution (a).

The distinction between primary and secondary evidence does not apply to evidence of acts actually done in the presence of eye-witnesses of the fact. Such acts may be proved by oral testimony, although there may be a record in writing of the things done. Acts done at a public meeting are provable by oral testimony, though the proceedings are put into writing, and read aloud from the chair. If a man reads a treasonable paper, the oral evidence of a bystander is admissible to prove what was read aloud, without producing or giving notice to produce the paper. The reduction of a speech or a resolution, therefore, into writing, does not prevent oral evidence of the speech and resolution from being given; and if the writing is produced it may be contradicted, and it may be shown by the oral testimony of the parties present not to be the writing that was read.

On an indictment for administering an unlawful oath, a bystander, who heard the words of the oath read out from a written paper, may prove the substance and object of the oath from general recollection of what was said, although no notice has been given to produce the paper (b).

If in an action for slanderous words it be proved that some person took down the words, that will not prevent another witness from giving parol evidence of what the words were (c). If a party makes a memorandum of particular facts and circumstances at the time they occur, and has not his paper with him, he may, nevertheless, give oral evidence of the facts, if he has a distinct recollection of them, independently of the writing (d); but the non-production of the writing is, of course, matter of comment and observation.

The mere fact of the payment of a sum of money, or of the amount of a particular bill, may be proved by oral testimony, although a receipt in writing may have been given for the money, or the amount paid may have been entered in a ledger or memorandum-book (e).

Where in an action of trover it appeared that two demands of goods had been made, one verbally and the other in writing, it was held that the verbal demand might be proved without production of the demand in writing. "I may," observes Lord Ellenborough, "make a demand in words and a demand in writing, and, both being perfect, either may be proved. If the verbal demand has any reference to the writing, the writing must be produced, but if they were concurrent and independent, I do not

(a) *R. v. Hunt*, 3 B. & Ald. 566.

(b) *Rex v. Moors*, 6 East, 421 n.

(c) *Sheridan's case*, 31 How. St. Tr.

673.

(d) *Thistlewood's case*, 33 ib. 758.

(e) *Rambert v. Cohen*, 4 Esp. 213.

see how adding the latter could supersede the former, or vary the mode of proving it" (f).

If at the trial a party produces what he alleges to be a copy of a document, and the opposite party then produces a document which he alleges to be the original, the judge must determine whether it is the original, for if it is, the copy is inadmissible (g).

Evidence of admissions of liability made by a defendant, although they relate to the contents of a deed or writing not produced.—The defendant's own declarations have been held to be admissible in evidence against him, although they relate to the contents of a written instrument not produced. "The authority of Lord Tenterden at nisi prius, in the case of *Bloxam v. Elsee*" (h) observes Parke, B., "is no doubt to the contrary; but since that case, as well as before, there have been many reported decisions, that whatever a party says, or his acts amounting to admissions, are evidence against himself, though such admissions may involve what must necessarily be contained in some deed or writing. The reason why such parol statements are admissible without notice to produce or accounting for the absence of the written instrument is, that they are not open to the same objection which belongs to parol evidence from other sources, when the written evidence might have been produced; for such evidence is excluded from the presumption of its untruth, arising from the very nature of the case where better evidence is withheld; whereas what a party himself admits to be true, may reasonably be presumed to be so. The weight and value of such testimony is quite another question" (i).

The mere relationship of landlord and tenant between particular parties may be established by their own admissions, by words and conduct, although the tenancy may have been created, and may be regulated by a lease in writing. And the declaration of a tenant of the terms upon which he holds his lands, the amount of his rent, and the time it becomes payable, is admissible in evidence against him, although the terms are embodied in a lease or written agreement, under which he holds (k).

But whenever you mean to give evidence of the declaration of a party for any purpose, you should first call the person himself, and ascertain from him whether he ever used the expressions or made the statement you wish to prove (l), and if the question put to him has reference to statements and declarations recorded in writing, he cannot be compelled to make admissions against himself without the production of the writing (m).

(f) *Smith v. Young*, 1 Campb. 439.

(g) *Boyle v. Wiseman*, 11 Exch. 367.

(h) *R. & M.* 187; 1 C. & P. 558.

(i) *Slatterie v. Pooley*, 6 M. & W. 669.
Newhall v. Holt, ib. 684. *Earle v. Picken*,
 5 C. & P. 542. *King v. Cole*, 2 Exch.

632.

(k) *Howard v. Smith*, 3 M. & Gr. 257;
 ante, p. 391.

(l) *Carpenter v. Wall*, 11 Ad. & E. 805.

(m) *Darby v. Ouseley*, 1 H. & N. 0.

Offers to make compensation, or to pay money, not amounting to an admission of liability.—When a man to prevent litigation, and by way of compromise, expresses a willingness to pay a sum of money, such conduct does not fairly raise an admission of such a liability as will make him answerable in law. Statements made to purchase peace and stave off litigation do not necessarily evince a consciousness of liability (n).

When a man is estopped from giving evidence to contradict his own statements and representations to the plaintiff.—Where one person by his words or conduct wilfully induces another to believe in the existence of a certain state of things, and induces him to act on that belief, or to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time (o). “By the term ‘wilfully,’” observes Parke, B., “we must understand, if not that the party represents that to be true which he knows to be untrue, at least that he means his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man’s real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and he did act upon it as true, the party making the representation would be equally precluded from contesting its truth” (p).

Where an action was brought for the conversion of a policy of insurance, and the plaintiff proved that he had given instructions to the defendant to effect a policy for him, and gave in evidence a letter from the defendant to the plaintiff stating that he had effected the policy, Lord Mansfield refused to allow the defendant to contradict his own representation, and show that no policy had been effected, and held him liable as an insurer for the amount that would have been recoverable by the plaintiff on the policy if it had been duly effected (q).

Proof in particular actions.—Various matters of evidence necessary to be adduced in support of the plaintiff’s claim in particular actions have already been shortly considered; such as actions for the infringements of rights and privileges incident to the possession, and connected with the use and enjoyment of land (ante, pp. 14, 69–73), actions for nuisances and injuries arising from the negligent use and management of real property (ante, pp. 112–115); for injuries to lands and tenements from waste, negligence, and fire (ante, pp. 135, 136); for trespasses upon real property (ante, pp. 169–178); trespass and conversion of chattels (ante, pp. 227–

(n) *Bullers*, N. P. 236 b, 7th edn. *Thomas v. Morgan*. *Beck v. Dyson*, ante, p. 115.

(o) *Pickard v. Sears*, 6 Ad. & E. 474. *Gregg v. Wells*, 10 Ad. & E. 98. *Piggott v. Stratton*, 29 Law, J., Ch. 9.

(p) *Freeman v. Cooke*, 2 Exch. 663. *Cornish v. Abington*, 4 H. & N. 557. *Haines v. E. Ind. Co.*, 13 Moore, P. C. C. 57. *Dunston v. Paterson*, ante, pp. 403, 479, 634.

(q) *Harding v. Carter*, Park Ins. 5.

231); injuries from the negligent use and management of chattels, and the negligent performance of work (ante, pp. 262-264); actions for the negligent keeping and unlawful detention of chattels by bailees (ante, pp. 297-299); for negligence and breach of duty on the part of common carriers and innkeepers (ante, pp. 340-343); for wrongful distress and sale of things distrained (ante, pp. 387-391); assault and battery, and wrongful imprisonment (ante, pp. 422-429); malicious arrest and malicious prosecution (ante, pp. 449-455); trespasses by judges, sheriffs, and ministerial officers of courts of justice, and the parties setting them in motion (ante, pp. 494-499); trespasses committed in the execution of warrants and orders of justices (ante, pp. 544-547); injuries resulting from the negligent exercise or abuse of statutory powers (ante, pp. 557, 566); actions for libel and slander (ante, pp. 616-630); fraudulent misrepresentation and deceit (ante, pp. 661-666); petitions for damages from adulterers (ante, pp. 690-693); actions for seduction (ante, pp. 699-704).

Proof of the revival and re-creation of easements and servitudes which have been extinguished or suspended by unity of ownership of the dominant and servient tenements—(ante, pp. 59-61).—We have seen that it has been laid down as law by some old authorities (ante, p. 60) that a way extinguished by unity of possession is revivable afterwards upon descent to two daughters, where the land through which the way passed is allotted to one, and the other land to which the way belonged is allotted to the other sister; and this allotment, without specialty to have the way anciently used, is sufficient to revive it. But in a recent case it has been held, that where there has been a unity of ownership of the dominant and servient tenements, so that the land to which the right of way is incident and the land over which the way passes become vested in the same person, the easement which has been extinguished by the unity of ownership is not revived, or re-created, on a severance of the tenements, unless the owner uses language clearly showing that he intended to create the easement de novo: so that if the occupiers of farm A have a right of way, not being a way of necessity over farm B, and both farms come into the hands of one and the same owner, and afterwards the two farms are again severed and granted to two different grantees, the extinct right of way will not be revived and re-created unless the grantor uses language to show that he intended to create the easement de novo (r).

Where there is a unity of seisin of the land, and of the way over the land in one and the same person, the right of way, as we have seen (ante, pp. 57-59), is either extinguished or suspended according to the duration

(r) *Worthington v. Gimson*, 29 Law, J., Q. B. 117.

of the respective estates in the land and in the way, and after such extinguishment, or during such suspension of the right, the way cannot pass as appurtenant under the ordinary sense of that word; and in the case of an unity of seizin in order to pass a way existing in point of user, but extinguished or suspended in point of law, the grantor must either employ words of express grant, or must describe the way in question as one used and enjoyed with the land which forms the subject-matter of the conveyance (s).

A grant of a house and land with all waters, watercourses, liberties, privileges, easements, rights and appurtenances thereunto belonging, or in anywise appertaining, or with the same held, used, occupied, or enjoyed, or reputed as part thereof, will, as we have already seen, transfer to the grantees all such visible and apparent easements and privileges as belonged and appertained to the premises, and were manifestly used and enjoyed with them at the date of the conveyance (t).

Proof of the surrender of an incorporeal right—Proof of possession of a ferry.—Where the plaintiff, the owner of a ferry, demised the ferry to a tenant, to be holden by him at an annual rent, and the tenant finding that he could not pay the rent agreed to become the servant of the plaintiff at certain wages, paying over to him all the profits of the ferry, and the agreement was carried out, and the quondam tenant became servant of the plaintiff, and worked the ferry and paid over the profits to the plaintiff, it was held that this was a surrender by operation of law of the tenant's interest in the ferry (u).

Amendment of variances between the declaration of the cause of action and the proof adduced in support of it.—By 3 & 4 Wm. 4, c. 42, s. 23, it is enacted, that any court of record in civil actions, or any judge at nisi prius, may cause the record, writ, or document on which any trial may be pending in a civil action, where any variance shall appear between the proof and the recital on the record, &c. of any contract, custom, prescription, name, or other matter, in any particular in the judgment of such court or judge not material to the merits of the cause, and by which variance the opposite party cannot have been prejudiced in the conduct of his action or defence, to be forthwith amended, on such terms as to payment of costs or postponing the trial as the court or a judge shall think reasonable; and in case such variance shall be in some particular in the judgment of such court or judge not material to the merits, but such as that the opposite party may have been prejudiced thereby in the conduct of his action or defence, then the same may be amended on the payment

(s) *James v. Plant*, 4 Ad. & E. 761.

Brookhurst, 8 W. R. Ex. C. 241.

(t) *Ante*, pp. 29-38. *Wardle v.*

(u) *Peter v. Kendal*, 6 B. & C. 710.

of costs to the other party, and withdrawing the record and postponing the trial, as such court or judge shall think reasonable. The judge may, however, avoid (s. 24) the responsibility of deciding, by directing the jury to find the facts according to the evidence, and leave the question of the materiality of the evidence for the consideration of the court above.

In actions for libel and slander, the judge had power under this statute, if there was a variance between the libel or slander charged in the declaration and the writing adduced in evidence, or the words proved to have been uttered, to amend the variance if the amendment did not create a new and different cause of action (x).

By the Common-Law Procedure Acts, 1852 & 1854 (15 & 16 Vict. c. 76, s. 222, and 17 & 18 Vict. c. 125, s. 96), it is now further enacted, that it shall be lawful for the superior courts of common law, and every judge thereof, and any judge sitting at nisi prius, at all times to amend all defects and errors in any proceedings in civil causes, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not; and all such amendments may be made with or without costs, and upon such terms as to the court or judge may seem fit, and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties, shall be so made if duly applied for (y).

The power of amendment given by these statutes is not confined to the amendment of variances, but enables the judge to amend by altering the form of the action (z), or by adding a plea necessary for the trial of the substantial question between the parties (a). Whether or not the proposed amendment is necessary for the purpose of determining the real question of controversy between the parties is a matter to be decided by the judge (b), but no amendment ought to be made which affords reasonable grounds of demurrer (c).

The court will control the power of amendment where it has been improperly exercised, and interfere to do what is right between the parties where an amendment has been improperly made; but it will not interfere where the judge, in the exercise of his discretionary power, has thought fit to refuse the amendment (d).

(x) *Smith v. Knowelden*, 2 M. & Gr. 504. *Southree v. Denny*, 1 Exch. 192. *Pater v. Baker*, 3 C. B. 834. *Saunders v. Bate*, 1 H. & N. 402.

(y) *Cornish v. Hockin*, 1 Ell. & Bl. 607. *Rols v. Davis*, 4 H. & N. 484. *May v. Footner*, 5 Ell. & Bl. 505. *Edwards v. Hodges*, 15 C. B. 477.

(z) *May v. Footner*, 5 Ell. & Bl. 507.

(a) *Mitchell v. Crassweller*, 13 C. B. 239. *Charney v. Grundy*, 14 C. B. 614.

(b) *Wilkin v. Reed*, 15 C. B. 205; 23 Law, J., C. P. 193.

(c) *Martyn v. Williams*, 1 H. & N. 827.

(d) *Holden v. Ballantyne*, 8 W. L. 390.

CHAPTER XXI.

OF THE DAMAGES AND COSTS RECOVERABLE IN ACTIONS
EX DELICTO.

SECTION I.—*Of damages recoverable in actions ex delicto generally.*—Of the maxim that there is no wrong without a remedy—Recovery of damages for the infringement of personal and proprietary rights where no actual damage is proved—Assessment of damages in actions ex delicto—When special and extraordinary damages are recoverable as the known natural or necessary consequence of the wrongful act—Damages not recoverable as being too remote, and not naturally resulting from the wrong done—Expenses incurred by a plaintiff in obtaining legal advice not recoverable as part of the damages—When the costs of previous legal proceedings and the amount of pecuniary liability occasioned by the wrongful act may be recovered as part of the damages—Prospective damages—Exemplary and vindictive damages—Evidence in aggravation and mitigation of damages—Recovery of damages from one of several co-trespassers, and from parties who have already received full indemnity under a contract of insurance—Double and treble damages—New trials on the ground of excessive damages or the smallness of the damages—Quashing of inquisitions of damages before the sheriff.

SECTION II.—*Of the recovery of costs in actions ex delicto.*—Award of costs to

the successful party—Taxation of costs—Costs of particular issues—When the court has no jurisdiction it has no power to award costs—Of the staying proceedings in a second action until the costs of a former action have been paid—Effect on the question of costs of withdrawing a juror at the trial—In what cases the plaintiff is entitled to no more costs than damages—In what cases the certificate of a judge or presiding officer is necessary to enable the plaintiff to recover his costs—When the judge or presiding officer has power to certify that the action was brought to try a right, or to certify to deprive the plaintiff of his costs—Within what time the certificate must be granted—Costs in cases of wilful and malicious trespass, or after notice has been given not to trespass—Costs in actions for wilful and malicious grievances, or for disturbance in the enjoyment of easements, privileges, and profits—Costs in actions against justices, constables, and officers, and in respect of things done in the bonâ fide execution of the Malicious Trespass Act—Costs in actions against executors—Costs in actions for selling impounded cattle—Cases where the plaintiff is deprived of costs by the County Courts Act—Of the repeal of divers statutes enabling plaintiffs to recover double costs.

SECTION I.

OF THE DAMAGES RECOVERABLE IN ACTIONS EX DELICTO.

Of the maxim that there is no wrong without a remedy.—The maxim that there is no wrong without a remedy may be true in a strict legal sense,

but many injuries may be sustained by individuals in respect of which damages are not recoverable at common law. We have seen, for example, that damages are not recoverable from an infant for a false and fraudulent representation that he was of full age, whereby the plaintiff was induced to lend him money (*ante*, p. 651); nor from a married woman and her husband for a false and fraudulent representation by such married woman that she was a *feme sole*, whereby she induced the plaintiff to make a contract with her, which he could not enforce by reason of her being married (*e*); nor from a man who has seduced a female infant, not being at the time of her seduction in her father's service, actual or constructive, even though the father be thereby obliged to provide nurses and medical attendance for her and to maintain her (*f*); nor from a man who has voluntarily presented himself as a witness in his own cause in a court of justice, and has sworn falsely and misled the judge, and induced the latter to order the plaintiff to be committed and tried for perjury (*ante*, p. 720); nor from a person who has wilfully and maliciously discharged guns near the plaintiff's rookery, and frightened away his rooks, and caused them to forsake the plaintiff's trees; for rooks have been declared to be a nuisance by the legislature, and no person can claim a right to have them resort to his lands, nor can any person become a wrongdoer by preventing their so doing (*g*): but an action lies, as we have seen, for discharging guns near the decoy-pond of another, by which the wild fowl are frightened away and the owner damnified, because wild fowl are protected by the statute 25 Hen. 8, c. 11, and constitute a known article of food, and the keeping of a decoy-pond is useful to the publick, and a profitable mode of employing the land, and the catching and selling the wild fowl constitute a profitable trade (*h*).

Damages for the infringement of personal and proprietary rights.—"The maxim of the law, *ubi jus ibi remedium*, has at all times been considered so valuable, that it gave occasion to the first invention of that form of action called an action on the case, where the novelty of the complaint is no objection to the action, provided an injury cognizable by law be shown to have been inflicted on the plaintiff" (*i*); for "this form of action was introduced for the reason that the law would never suffer an injury and a damage without a remedy" (*k*), *i.e.* an injury cognizable by law; for there are many cases, as we have seen, where parties have suffered serious

(*e*) *Liverpool Adelphi Loan Association v. Fairhurst*, 9 Exch. 429.

(*f*) *Grinnell v. Wells*, 8 Sc. N. R. 741; 7 M. & Gr. 1038.

(*g*) *Hannan v. Mockett*, 2 B. & C. 943.

(*h*) *Keeble v. Hickeringill*, 11 East.

574 n.; *ante*, p. 75.

(*i*) See the note to *Ashby v. White*, 1 Smith's L. C. 213-223.

(*k*) *Willes, C. J., Winsmore v. Greenbank*, *Willes*, 577. See, however, *Alsopp v. Alsopp*, 8 W. R. 440.

damage from the wrong-doing of others, of which the law takes no notice (ante, pp. 651, 720, 772).

In these cases the party is said by the lawyers to have suffered *damnum sine injuriâ*.

To establish a ground for recovering damages, the plaintiff must show that he is possessed of some legal right which has been invaded. A man's legal rights are the rights of personal security, personal liberty, or private property; and private property is either property in possession, property in action, or property that an individual has a special right to acquire (*l*).

Wherever the plaintiff is impeded in the use and enjoyment of his property, or in the exercise of his trade or calling, by the malicious or wrongful act of another, there, as we have seen, damages are recoverable for the wrong done (*m*). Where the plaintiff in his declaration of his cause of action set forth that he was a mason, and possessed of a stone quarry, and quarried and dug stones therefrom as well to sell as to build stone buildings, and that the defendant, intending to deprive him of the benefit of his quarry, disturbed his workmen and all comers, threatening to maim and vex them with suits if they worked or bought stones there, whereupon all the buyers desisted from buying and the workmen from working there, it was held that this was a great damage to the plaintiff and a good cause of action (*n*). So if the plaintiff's tenants have been driven away from their holdings by the menaces of the defendant, damages are recoverable for the wrong done (*o*).

"There are two sorts of acts for doing damage to a man's employment, for which an action lies: the one is in respect of a man's privilege, the other is in respect of his property. In that of a man's franchise or privilege whereby he hath a fair, market, or ferry, if another should use the like liberty, though out of his limits, he shall be liable to an action, though by grant from the king. But therein is the difference to be taken between a liberty in which the publick hath a benefit and that wherein the publick is not concerned. The other is where a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood; there an action lies in all cases. But where one man doth damage to another by using the same employment no action will lie, because one man has as much liberty to use an employment as another." Thus, where one schoolmaster sets up a new school to the damage of an ancient school, and thereby the old scholars are allured from the old school to come to the new school, an action is not maintainable (11 H. 4, 47). But if a

(*l*) Bayley, J., *Hannam v. Mockett*, 2 B. & C. 937.

(*m*) *Young v. Hichens*, ante, p. 197.

(*n*) *Garret v. Taylor*, Cro. Jac. 567.

(*o*) 1 Roll. Abr. 108, pl. 21.

man should lie in wait and fright the boys from going to school, that schoolmaster might have an action for the loss of his scholars (*p*).

Damages are recoverable from a parson who takes up tombstones in his churchyard and defaces the inscriptions, for although the freehold of the churchyard is in the parson, the property in the tombstones remains in the persons who erected them (*q*).

Where the plaintiff declared that she was a virgin of good name and fame, and sought for in marriage by J. S., and that the defendant, pretending himself to be a single person, made love to her and married her, when in truth he was married to another woman, whereby she became of less credit, &c., the court held that the action lay (*r*).^a

Of the recovery of damages for infringement of rights where no actual damage can be proved.—In every case of an injury to a right, damages are, as we have already seen, recoverable, although no actual perceptible damage can be proved (*s*). Thus, if a free burgess of a corporation, or any other person having an undoubted right at law to give his vote at an election of a burgess or knight to serve in parliament, be maliciously hindered or impeded in the exercise of his right, an action for damages is maintainable against the disturber, for every injury to a right imports a damage, though it does not cost the party one farthing (*t*). Any person has a right to stand for a place in parliament, or to offer himself as a candidate for a vacant office; and if an election takes place, and it becomes difficult to determine who has the majority, he is entitled to demand a poll, and if the publick officer who ought to have granted the poll denies it, he is liable to an action for substantial damages (*u*); for if publick officers will infringe men's rights, and "refuse to receive a vote which the party tendering has a right to give, and if an action for it comes to be tried before me," observes Holt, C. J., "I will direct the jury to make them pay well for it" (*x*).

But in order to maintain an action against the returning officer at an election for his refusal to receive and register a vote, the plaintiff must show that the refusal was founded in malice. Malice may be proved by evidence of personal hostility and spite entertained by the defendant against the plaintiff, or of any other corrupt or improper motive in the refusal of the vote (*y*). "If the returning officer has acted honestly and uprightly according to the best of his judgment, he is not amenable in an

(*p*) Per Holt, C. J., *Keeble v. Hickeringill*, 11 East. 576 n.

(*q*) *Spooner v. Brewster*, 3 Bing. 139; Cro. Jac. 307.

(*r*) Anon. Skin. 119.

(*s*) *Embrey v. Owen*, 6 Exch. 368; ante, pp. 14, 72, 73, 116, 179.

(*t*) Holt, C. J., *Ashby v. White*, 2 Ld. Raym. 954.

(*u*) *Starling v. Turner*, 2 Lev. 50.

(*x*) *Ashby v. White*, 2 Ld. Raym. 958. *Herring v. Finch*, ib. 250.

(*y*) *Tozer v. Child*, 7 Ell. & Bl. 381.

action for damages for refusing to receive the vote. The duties of the returning officer are neither entirely ministerial nor wholly judicial; they are of a mixed nature. It cannot be contended that he is to exercise no judgment, no discretion whatever, in the admission or rejection of votes; and the officer could not discharge his duty without great peril and apprehension if, in consequence of a mistake, he became liable to an action" (z).

Every invasion of the plaintiff's right by the fraudulent act of the defendant entitles the plaintiff to some damages. Thus, where an inventor or manufacturer adopts a particular trade-mark, and the defendant imitates it and uses it for the purpose of palming off his own goods as the goods of the plaintiff, the plaintiff is entitled to substantial damages, as his right has been invaded, although no specific damage can be proved (a). Every infringement of a right *ex contractu* also creates a claim to damages. Thus, where one person maliciously procures or persuades another to break a contract, or interferes between an employer and workman to prevent the latter from completing work he has undertaken to perform, or procures the non-delivery of goods according to contract (b), or deprives a woman of her marriage by false representations, substantial damages are recoverable (c).

A refusal by a banker to pay the order or draft of his customer, he having at the time in his hands sufficient funds of the customer for the purpose, is a wrongful act, injurious to the credit of the customer, entitling him to substantial damages, although no actual damage can be proved at the trial (d). If the plaintiff's right to a seat in a pew in church has been infringed, substantial damages are recoverable (e).

Of the assessment of damages in actions ex delicto.—In actions of tort, a greater latitude is allowed by the court to a jury in the assessment of damages than is allowed in actions of contract. "The damages must be excessive and outrageous to warrant a new trial" (f); "for it is not to be expected that a jury will measure their verdict so nicely as in cases of contract" (g). Therefore, where some printers' devils, who had been unlawfully imprisoned for a week, brought their several actions, and the jury gave each of them 300*l.* damages, the court declined to meddle with the verdict, although it was proved that each of the plaintiffs had been

(z) Abbott, C. J., *Cullen v. Morris*, 2 Stark. 587.

(a) *Blafeld v. Payne*, 4 B. & Ad. 410. *Rodgers v. Nowill*, 5 C. B. 125; ante, pp. 640, 650.

(b) *Green v. Button*, 2 C. M. & R. 707. *Lumley v. Gye*, 2 Ell. & Bl. 238.

(c) *Sheppard v. Wakeman*, 1 Lev. 53.

(d) *Marzetti v. Williams*, 1 B. & Ad.

415. *Rolin v. Steward*, 14 C. B. 595; 23 Law, J., C. P. 148.

(e) *Griffith v. Matthews*, 5 T. R. 296.

(f) De Grey, C. J., *Sharpe v. Brice*, 2 W. Bl. 942. *Huckle v. Money*, 2 Wils. 205.

(g) *Cresswell, J., Williams v. Currie*, 1 C. B. 848; *Fabrigas v. Mostyn*, 2 W. Bl. 928.

well fed upon beef-steaks and porter during the whole period of their imprisonment.

There are only two grounds on which the court will interfere with the damages: one, where the finding has proceeded from some mistake; the other, where the jury have acted from some sinister feeling, and the judge is dissatisfied with their verdict (*h*). If the jury give the plaintiff more damages than by his own showing he ought to recover (*i*), or if there be several counts in the declaration, and a verdict is entered generally on all the counts, and entire damages are given, and one count is bad, the damages so assessed cannot be recovered, and a venire de novo must be awarded (*k*). If an action of slander be brought for words spoken at different times, and the action will not lie for the words spoken at one time, but will lie for words spoken at another, and a verdict is found for all the words, and entire damages are assessed, no judgment will be given (*l*); but when words are all spoken at one time, and some of them are actionable and some not, and damages are assessed generally, they shall be intended to be given only for those words which are actionable, and it shall be presumed that the others were inserted only for aggravation (*m*).

Of the damages recoverable in particular actions.—The damages recoverable in actions for obstruction to the enjoyment of profits à prendre and easements, and for the infringement of incorporeal rights, have already been considered (ante, pp. 14, 15, 72, 73), also the damages recoverable in actions for nuisances and keeping ferocious animals (ante, pp. 115–117); for injuries to real property from waste, negligence, and fire (ante, pp. 136–138); actions for trespasses upon real property (ante, pp. 178–182); and for trespass and conversion of chattels (ante, pp. 231–236); and for injuries from the negligent use and management of chattels, and the negligent performance of work (ante, pp. 264–266); actions for the detention and loss of chattels by bailees (ante, pp. 299–302); for negligence and breach of duty on the part of common carriers, common ferrymen, common innkeepers, and lodging-house keepers (ante, pp. 342–344); actions for a wrongful distress and sale of things distrained (ante, pp. 391–398); actions for assault and battery and wrongful imprisonment (ante, pp. 429–432); malicious arrest and malicious prosecution (ante, pp. 455, 456); actions against sheriffs, bailiffs, and officers

(*h*) *Wallington v. Wood*, C. P. Nov. 8th, 1860. *Britton v. S. W. Rail. Co.*, 27 Law, J., Exch. 355; see post, NEW TRIALS.

(*i*) *Hambleton v. Veere*, 2 Wms. Saund. 170.

(*k*) *Grant v. Astle*, Doug. 730. *Leach*

v. Thomas, 2 M. & W. 427.

(*l*) *Popham, J., Brooke v. Clarke*, Cro. Eliz. 328. *Jazon v. Tanner*, Cro. Car. 237.

(*m*) *Penson v. Gooday*, ib. 327. *Thaxbie v. Smith*, Cro. Eliz. 788. *Berkeley v. Earl of Pembroke*, Moore, 706. *Broughton's case*, ib. 708.

for negligence and breach of duty (ante, pp. 498–502); actions for trespasses committed under colour of warrants and orders of justices (ante, pp. 547, 548); statutory compensations for injuries authorized by statute (ante, pp. 573–575); actions for libel and slander (ante, pp. 626–629); actions for fraudulent misrepresentation and deceit (ante, pp. 666–671).

Where a person has been induced, by false accounts of the transactions and profits of a joint-stock company, to buy shares therein, and give for them a sum far beyond their real value; the measure of damages is the difference between the actual value of the shares at the time of the purchase, and the fictitious value imparted to them by the false representation (*n*).

As against a manifest wrongdoer a jury is, as we have seen, justified in making the strongest presumptions, so that if an article of value, such as a diamond necklace, has been taken away, and part of it is traced to the possession of the defendant, the jury may reasonably infer that the whole thing has come into his hands, and give damages accordingly (*o*). Where the plaintiff, by his own dealings and acts, renders the nature of his interest in the property and the extent of the damages altogether doubtful, he may vacate his whole claim, or destroy his right to more than nominal damages (*p*).

In an action by a judgment-creditor against a sheriff for an escape, where the sheriff had received the amount of the judgment-debt and costs from the judgment-debtor, and then discharged him, it appeared that the debtor was suffering in custody, that vain attempts had been made to find the plaintiff or his attorney to receive the money, and that the sheriff then received it and allowed the debtor to escape, it was held that the measure of damages was the amount of the debt and costs so received by the sheriff, and that the judgment-creditor was entitled to nothing further (*q*).

In an action for oral slander, where the cause of action rests upon special damage alleged and proved, the jury, in assessing their damages, are not limited to the amount of special damage proved, but may give their verdict for general damages, which would in their judgment be the natural and probable result of it. They must, however, as we have seen (ante, p. 608), exclude from their consideration damages resulting from the repetition of the slander by third parties who had no authority from the defendant to repeat it (*r*).

(*n*) *Davidson v. Tulloch*, 8 W. R. 309; 30 Law, T. R. 97; ante, pp. 638, 656.

(*o*) *Mortimer v. Cradock*, ante, p. 332.

(*p*) Ante, p. 284. *Pringle v. Taylor*, 2 Taunt. 150.

(*q*) *Hemming v. Hale*, 29 Law, J., C. P. 137; and see ante, pp. 477, 478.

(*r*) *Dizon v. Smith*, 29 Law, J., Exch. 125. *Evans v. Harries*, 26 ib. 31. *Alsopp v. Alsopp*, 8 W. R. 449.

When special and extraordinary damages are recoverable as the known natural and necessary consequence of the wrongful act.—All damages which ordinarily and in the natural course of things might fairly be expected to result, and have resulted from the commission of the wrongful act, are recoverable, provided they are claimed by the plaintiff in his declaration (s). If by reason of the defendant's negligence and breach of duty the property of the plaintiff has become deteriorated and reduced in value by rain, storm, or frost, or any destructive agencies of ordinary occurrence, the plaintiff will be entitled to recover all the damage he has sustained thereby (t). All persons are responsible for all the natural consequences resulting from acts done by them in violation of the rights of others. The jury are entitled to look into all the circumstances and at the conduct of both parties, and see where the blame is, and what ought to be the compensation according to the way the parties have conducted themselves (u). Where the plaintiff has been compelled to pay money to release himself from the injurious consequences naturally resulting from the wrongful act of the defendant, such money is recoverable from the defendant as part of the damages. This is the case, as we have seen, where a plaintiff has been compelled to pay money to procure his release from a wrongful imprisonment by the defendant (ante, p. 431).

Whenever one person commands or authorizes an act to be done by another, he is responsible for all that the other does in the necessary execution of his authority. If, therefore, an assault and imprisonment of the plaintiff are the necessary or probable consequence of orders given by the defendant, the defendant will be responsible in damages for such assault and imprisonment, although he did not directly order it, or contemplate the possibility of its occurrence (x).

In an action for breaking and entering the plaintiff's dwelling-house, and assaulting and beating him, Lord Ellenborough allowed the plaintiff to give in evidence that his wife was so terrified by the conduct of the defendant that she was immediately taken ill and died soon afterwards, not as a substantive ground of damage, but for the purpose of showing how outrageous and violent had been the conduct of the defendant (y). "But I entertain considerable doubt," observes Pollock, C. B., "whether a person who is guilty of negligence is responsible for all the consequences which may under any circumstances arise, and in respect of mischief which could

(s) Pollock, C. B., *Rigby v. Hewitt*, 5 Exch. 242.

(t) *Smeed v. Foord*, 28 Law, J., Q. B. 178.

(u) *Davis v. North-West. Rail. Co.*, 1

Jur., N. S. 1803.

(x) *Glynn v. Houston*, 2 M. & Gr. 837.

(y) *Huxley v. Berg*, 1 Stark. 98.

Bracegirdle v. Orford, 2 M. & S. 77.

by no possibility have been foreseen, and which no reasonable person would have anticipated" (z).

When damages are not recoverable as being too remote, and not naturally resulting from the wrong done.—Where the manager of a theatre brought an action against the defendant for a libel on an opera-singer, who had been engaged by him to sing at his theatre, and who had been deterred from singing by reason of the publication of the libel, whereby the plaintiff lost the benefit of her services, it was held that the damage was too remote, and was not recoverable by the plaintiff (a). And where the defendant went before a county-court judge and swore falsely against the plaintiff, and by his own false testimony induced the judge to disbelieve the plaintiff on his oath, and to order the plaintiff to be committed to take his trial for perjury, and the defendant to be bound over to prosecute, and the defendant did prosecute, and the plaintiff was acquitted, and then brought an action against the defendant for a malicious prosecution, it was held that the immediate cause of the prosecution was the order of the county-court judge, and that the defendant's false testimony before him, causing him to make the order, was not sufficiently proximate to make the defendant responsible for the prosecution (b).

Where a passenger on board ship was assaulted and imprisoned for one night by the captain, and in consequence thereof took the first opportunity of leaving the ship, and paid 100*l.* for his passage home in another vessel, it was held that in order to recover the 100*l.* as part of the damages for the assault and imprisonment it was necessary for the plaintiff to prove that there was fair and reasonable ground for fearing a renewal of the ill-treatment, and that he left the vessel under the influence of such fear, and not merely because he was angered and displeased with the captain, and could not continue on board with ease and comfort (c).

Of the recovery of damages in actions of tort founded on contract—Damages not recoverable as being too remote.—When the action of tort is founded on a breach of contract, the damages recoverable are those which may fairly and reasonably be considered to arise naturally according to the usual course of things from the breach of contract itself, or which may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it. If special circumstances exist which render the neglect or breach of duty productive of more than ordinary injury and damage to

(z) *Greenland v. Chaplin*, 5 Exch. 248.

(a) *Ashley v. Harrison*, 1 Esp. 49.

(b) *Fitzjohn v. Mackinder*, 8 W. R.

C. P. 341; Willes, J., *dissentiente*: ante, p. 720.

(c) *Boyce v. Bayliffe*, 1 Campb. 58.

the owner, such special circumstances must have been communicated to the defendant in order to make him responsible for the special and extraordinary damages resulting from any neglect or breach of duty on his part (*d*).

Expenses incurred by a plaintiff in obtaining legal advice not recoverable as part of the damages.—The expense incurred by a plaintiff in consulting an attorney and obtaining a legal opinion upon the validity of his claim, are not recoverable as part of the damages. "Parties must do what they think is right, and the expense of getting the experience of attorneys to advise is not to be repaid by the other party. Nothing of that sort can be allowed in damages, and everything of that nature that a plaintiff is entitled to will be allowed in the taxation of costs" (*e*).

When the costs of previous legal proceedings occasioned by the wrongful act may be recovered as part of the damages.—A defendant in an action ex delicto is responsible in damages, as we have seen, for the natural and ordinary consequences of the wrong done. Where, therefore, the defendant, who was employed as architect to superintend the building of a church, ordered stone for the church from the plaintiffs in A's name, and on his account, and the plaintiffs supplied the stone, and afterwards sued A for the price, but failed in their action, and had to pay A's costs and the costs of their own attorney, because it was proved at the trial that the defendant had received no authority from A to order the stone in his name, and the plaintiffs then brought an action against the defendant to recover the damages they had sustained by reason of his false assumption of agency and pretence of authority for the order he gave, it was held that the plaintiffs were entitled to recover from the defendant not only the value of the stone ordered by him in A's name, but also the costs they had incurred and paid in the former action (*f*). In another case, where the agent believed that he had the authority he claimed to possess, and had no authority, it was held that the costs of a chancery suit, which was occasioned by his false assumption of authority, were recoverable as part of the damages (*g*).

Where a tenant gave his landlord notice to quit, and then refused to give up possession, it was held, as we have seen, that the landlord was entitled to recover the costs of an action brought against him by a person to whom he had contracted to let the premises, but to whom he was unable to give possession in consequence of the refusal of the tenant

(*d*) *Hadley v. Bazendale*, 9 Exch. 354.
Portman v. Middleton, 4 C. B., N. S.,
 322; 27 Law, J., C. P. 231. *Theobald v.*
Rail. Pass. Ass. Co., 10 Exch. 45. *Peter-*
son v. Ayre, 13 C. B. 353.

(*e*) *Clare v. Maynard*, 7 C. & P. 743.

(*f*) *Randell v. Trimen*, 18 C. B. 786;
 25 Law, J., C. P. 307.

(*g*) *Collen v. Wright*, 7 Ell. & Bl. 311;
 8 ib. 647, in error; 26 Law, J., Q. B.
 147; 27 ib. 215.

to go out pursuant to his notice. "The letting to a new tenant," observes Cockburn, C. J., "is the ordinary course of dealing on the part of an owner of land under such circumstances. The defendant, therefore, must have understood, that when the plaintiff gave him notice to quit he would enter into a new contract with a new tenant to let the premises to him from the expiration of such notice. And in this case the tenant was apprised of the fact that the landlord had relet the premises, and was consequently aware of the inconvenience and loss he was exposing him to by his improper conduct" (*h*).

In an action for running down a ship, it appeared that the plaintiff had been obliged, in consequence of the injury, to employ a steam-tug, the owners of which demanded 150*l.* for salvage, and commenced a suit in the Admiralty Court against the plaintiff, who paid 20*l.*, and the court ultimately decreed the payment of 45*l.*, with costs, to the salvors, and the plaintiff sought to recover these costs as part of the damage he had sustained, it was held that the proper question for the jury was, whether the plaintiff in paying only 20*l.* into court, and risking the costs of the action, had pursued the course which a prudent and reasonable man would take in his own case, and that if the jury thought he had, the costs of the suit might be recovered (*i*).

If the buyer of a horse or a picture with a warranty, relying on the warranty re-sells the horse or the picture with a warranty, and being sued thereon by his vendee, gives notice to the defendant of the action, and receives no direction from the latter to give up the cause, and proceeds to defend and is worsted, the costs and damages of the defence to that action are part of the damages which the plaintiff sustains by reason of the false warranty found against the defendant, and may be recovered by the plaintiff in an action against the defendant for damages for the breach of warranty (*k*). But if the plaintiff has made a rash and improvident defence, after having had an opportunity of ascertaining by examination that the warranty could not be supported, he will not be permitted to recover the costs of his defence (*l*); for "no person has a right to inflame his own account against another by incurring expenses in an unrighteous resistance to an action which he cannot defend with any prospect of success" (*m*). If the costs have been taxed, the taxed costs only can be recovered (*n*).

If a laud agent professes to have authority from a landowner to let

(*h*) *Bramley v. Chesterton*, 2 C. B., N. S. 605.

(*i*) *Tindall v. Bell*, 11 M. & W. 228.

(*k*) *Lewis v. Peake*, 7 Taunt. 152.
Pennell v. Woodburn, 7 C. & P. 118.
Randall v. Roper, 27 Law, J., Q. B. 266;

1 Ell. Bl. & Ell. 84.

(*l*) *Wrightup v. Chamberlain*, 7 Sc. 598.

(*m*) *Ld. Donnan, C. J., Short v. Kalloway*, 11 Ad. & E. 31.

(*n*) *Grace v. Morgan*, 2 Sc. 793.

land, and signs an agreement for a lease, and the landowner repudiates the lease and denies the authority, and the intended tenant, relying on the representation of the agent, files a bill in Chancery against the landowner for a specific performance of the agreement, and notice of the suit is given to the agent, and the latter fails to withdraw his assertion of authority, he will be liable to pay the costs of the Chancery suit if the suit proceeds, and it is established that he had not the authority he pretended to have (o). But no person relying on a pretended authority of this sort ought in prudence to take legal proceedings against the supposed principal without giving notice to the pretended agent, and giving him an opportunity of withdrawing or verifying his assertion of authority (p).

Recovery of damages which the plaintiff has become liable to pay through the default of the defendant, but which have not been actually paid at the time of the commencement of the action.—A liability on the part of the plaintiff to pay damages to a third party, by reason of the default of the defendant, is enough, as we have seen, to enable the plaintiff to recover those damages from the defendant. It is not necessary that the money itself should be actually paid. Thus, where the defendant sold barley to the plaintiff, warranted to be chevalier seed-barley, and the plaintiff resold it with a similar warranty, and the barley was not chevalier seed-barley, and the sub-purchaser claimed damages from the plaintiff, whereupon the plaintiff fell back upon the defendant and sued him for these damages, it was held, as we have seen (ante, p. 670), that he was entitled to recover them, although he had not paid them to the sub-purchasers. "I consider," observes Crompton, J., "that it was not necessary that there should be a payment before the right to recover these damages accrued, and that the jury may well calculate all the mischief which, according to the breach of contract, might accrue to the plaintiffs. This matter has been a good deal discussed in cases of special damage, and it has been usual to give in evidence the amount of the bills sent in by surgeons and attorneys, but it has never been said that the liability to pay is not enough to enable the plaintiff in an action of that kind to recover, and from the very nature of the thing here the amount of damages is ascertainable from the kind of crop which grows up. Then, another reason for so holding is, that according to the principle upon which damages are assessed they are only to be assessed once, and therefore the jury ought to take all these circumstances into consideration in estimating the amount of damages to which the plaintiffs are entitled" (q).

(o) *Collen v. Wright*, ante, p. 781.](p) *Wightman, J.*, 26 Law, J., Q. B. 151.(q) *Randall v. Raper*, 1 Ell. Bl. & Ell.84; 27 Law, J., Q. B. 268. *Spark v. Heslop*, 28 ib. 197. *Diagle v. Hare*, 29 ib. C. P. 143.

Recovery of a surgeon's bill and of a physician's fees as part of the damages.—Where the plaintiff had been wounded by the negligence of the defendant in the management of a gun, and had employed a surgeon and physician for the cure of the injury he had sustained, Lord Ellenborough told the jury, that as to the surgeon's bill they were to consider the amount as paid by the plaintiff, since the surgeon could compel the payment of it as a legal debt, but that the physician's fees could not be taken into account, since they had not been actually paid, and the physician could not enforce payment by action (r).

Where the declaration alleged an actual payment of the charges of such third party, the allegation was held material, and necessary to be proved in order to enable the plaintiff to recover the amount of them (s).

Prospective damages are not recoverable where the cause of action is of a continuing nature, such as a nuisance arising from the obstruction of a drain, watercourse, or thoroughfare, where a fresh cause of action arises de die in diem as long as the obstruction lasts (ante, p. 116). But when the cause of action is not of a continuing nature, but has accrued once for all, the prospective as well as the present injury, sustained at the time the action was commenced, may, as we have seen (ante, pp. 430, 431), be regarded by the jury in determining what will be a fair compensation to be awarded to the plaintiff. But the future injury must be the natural and necessary result of the wrong done, and not the consequence of any further wrongful act giving rise to a fresh cause of action.

Although a plaintiff is not to be compensated for uncertain and doubtful consequences, which may never ensue, yet he is entitled to compensation for losses which will "almost to a certainty happen." The jury may take into their consideration in making up their minds on the damages, losses which will in all probability be sustained by the plaintiff; for "when the cause of action is complete, when the whole thing has but one neck, and that neck has been cut off by one act of the defendant, it would be most mischievous to say—it would be increasing litigation to say—you shall not have all you are entitled to in your first action, but you shall be driven to bring a second, a third, or a fourth action for the recovery of your damages" (t).

In an action for an assault, battery, and mayhem, the plaintiff declared that the defendant beat his head against the ground, and that he brought an action for it against the defendant, and recovered no more than 11*l.*, and that since that recovery, by reason of the same battery, a piece of his

(r) *Dixon v. Bell*, 1 Stark. 280. *Loosemore v. Radford*, 9 M. & W. 657. *Spark v. Heslop*, 28 Law, J., Q. B. 197.

(s) *Jones v. Lewis*, 9 Dowl. P. C. 150.

Pritchett v. Boevey, 1 Cr. & M. 778.

(t) Best, C. J., *Richardson v. Mellish*, 2 Bing. 240.

skull came away. The defendant pleaded the recovery of the 11*l.* mentioned in the declaration in bar of the action, and the plaintiff demurred, and it was contended that the special subsequent damage was a sufficient foundation for the action, and that the jury could not have taken the subsequent damage into their consideration on the previous trial; but per Holt, C. J., "Every one shall recover damages in proportion to his prejudice which he hath sustained; and if this matter had been given in evidence as that which in all probability would be the consequence of the battery, the plaintiff would have recovered damages for it. The injury which is the foundation of the action is the battery, and the greatness or consequence of that is only in aggravation of damages. In some cases the damage is the foundation of the action, as in the action by the master for the battery of his servant per quod servitium amisit; but here the battery only is the foundation of the action, and this damage, which might probably ensue, might and ought to have been given in evidence, and must be intended to have been given in evidence in the former action; and we must presume that the jury gave damages for all the hurt that the plaintiff suffered, for if the nature of the battery was such as probably to produce this effect, the jury might give damages for it before it happened" (u).

In an action for keeping a ferocious dog, which bit the plaintiff's apprentice and servant, and permanently injured his hand and arm, whereby he was disabled and prevented from serving the plaintiff in his business, the plaintiff claimed damages, not only for the loss of the services of the apprentice down to the time of the commencement of the action, but for the loss of the future services of the apprentice from thenceforth up to the time of the expiration of the apprenticeship; and the plaintiff having proved that his apprentice was permanently disabled, it was held that these prospective damages were recoverable, as they arose from the injury done at the time specified in the declaration. "It is argued," observes Littledale, J., "that a fresh action might be brought from time to time; but that is not so, the action being founded not upon the damage only, but upon the unlawful act and the damage. Without the special damage the action would not be maintainable at the plaintiff's suit. A fresh action could not be brought unless there were both a new, unlawful act, and fresh damage" (x).

In estimating the damages in an action for a libel against a trader, the jury may take into consideration the prospective injury which will probably accrue to the trader from the publication of the libel (y). It

(u) *Fetter v. Beale*, 1 *Ld. Raym.* 339, E. 305.
092; 1 *Salk.* 11; ante, pp. 430, 431.

(y) *Gregory v. Williams*, 1 *C. & K.* 568.
(x) *Hodgson v. Stallebrass*, 11 *Ad. &*

has been said that the damage sustained at the time of the commencement of the action is all that the plaintiff can recover, and that the jury cannot take into account the prospective injury; but "it appears to me," observes Bosanquet, J., "that the jury were warranted in proportioning the damages to the amount of injury that would naturally result from the act of the defendant, though it might not affect him until a subsequent period" (2). And the jury may, it seems, give damages for the mental suffering arising from the apprehension of the future consequences of the publication of the libel (a).

In assessing the damages for a breach of warranty, if it appears that the plaintiff, who complains of a breach of warranty on a sale to him of certain articles, has himself re-sold the subject-matter of the warranty with a warranty, the jury ought to take this into consideration in assessing the damages, and give the plaintiff such a sum as it appears to be probable he will be compelled to pay by way of compensation to the sub-purchaser (b).

Where the plaintiff in an action against a railway company for damage resulting from the negligent construction of an embankment had previously received compensation for the damage done to him by the construction of the railway works, it was held that the compensation related only to such known and contingent damage as was apparent and capable of being ascertained and estimated at the time when the compensation was awarded, and that it did not embrace certain damage which afterwards arose from the negligent construction of the works, and which could not then have been foreseen (c).

When a plaintiff receives compensation under the railway acts for the damage he has sustained by reason of the construction of the railway works, the compensation is confined to that which is the natural and necessary result of the doing what is authorized to be done by the legislature, supposing it to be done carefully and judiciously. Damage resulting from the negligent execution of the works is no ground for compensation under these statutes, but must be made the subject of an action (ante, p. 551).

Of exemplary and vindictive damages.—We have already seen that in actions of tort the damages are left very much to the discretion and judgment of the jury; and in all cases of malicious injuries and trespasses accompanied by personal insult, or oppressive and cruel conduct, juries are told to give, and are allowed to give, what are called exemplary damages, although the actual personal injury measured by any

(2) *Ingram v. Lawson*, 8 Sc. 477.

(a) *Goslin v. Corry*, 8 Sc. N. R. 25.

(b) *Randall v. Roper*, ante, p. 660.

(c) *Lawrence v. Gt. Northern Rail. Co.*,
16 Q. B. 643; 20 Law, J., Q. B. 293.

pecuniary standard may be but small. "It tends," observes Heath, J., "to prevent the practice of duelling if juries are permitted to punish insult by **EXEMPLARY DAMAGES**. I remember a case where a jury gave 500*l.* damages for knocking a man's hat off, and the court refused a new trial" (*d*). "Where," observes Gibbs, C. J., "a man is disposed to disregard every principle which actuates the conduct of a gentleman, what is to restrain him except large damages?" (*e*).

In an action for damages by a journeyman printer for an unlawful imprisonment under a general warrant, which had been issued by the Secretary of State without any information or charge laid before him, and without any person being named in the warrant, the jury gave 300*l.* damages, and a motion for a new trial, on the ground that the damages were excessive, was refused, though it appeared that the plaintiff had been in custody only six hours, and during that time he had been treated very well, and had sustained very little personal injury. "If the jury," observes Pratt, C. J., "had been confined by their oath to consider the mere personal injury only, perhaps 20*l.* damages would have been thought sufficient; but the small injury done to the plaintiff, or the inconsiderableness of his station and rank in life, did not appear to the jury in that striking light in which the great point of law touching the liberty of the subject appeared to them at the trial. They saw a magistrate over all the king's subjects exercising arbitrary power, violating Magna Charta, and attempting to destroy the liberty of the kingdom by insisting upon the legality of this general warrant. They heard the king's counsel, and saw the solicitor of the Treasury endeavouring to support and maintain the legality of the warrant in a severe and tyrannical manner. These are the ideas which struck the jury on the trial, and I think they have done right in giving **EXEMPLARY DAMAGES**" (*f*). So, where an action was brought by the plaintiff for the seduction of his daughter, and damages were recovered, and a motion for a new trial was grounded on circumstances showing the damages to be excessive, Wilmot, C. J., stated that "actions for seduction are brought for **EXAMPLE'S** sake; and although the plaintiff's loss in this case may not really amount to the value of 20*s.*, yet the jury have done right in giving liberal damages" (*g*).

And wherever the wrong or injury is accompanied with circumstances of great aggravation, the jury are authorized in giving, and may be told to give vindictive damages (*h*).

(*d*) *Merest v. Hervey*, 5 Taunt. 442;
ante, pp. 178, 179, 429, 430.

(*e*) *Ibid.* 441.

(*f*) *Huckle v. Money*, 2 Wils. 207.

(*g*) *Tullidge v. Wade*, 3 Wils. 18.

(*h*) *Thomas v. Harris*, 27 Law, J.,
Exch. 353.

Wherever injury has been done to the fair fame, reputation, or character of the plaintiff, juries are generally invited to give, and are justified in giving, such a sum as marks their sense of the maliciousness or utter recklessness of the wrongdoer in offering the insult and injury; their belief in the groundlessness of the charge, and their desire to vindicate the character of the plaintiff (*i*). Thus, in all actions of libel and slander, where the object of the plaintiff is to clear himself from aspersions that have been cast upon him, the jury are in the habit of giving large damages, with a view of vindicating the plaintiff's character from the aspersions cast upon it. Where in an action against a colonel of militia for ordering the plaintiff, a common soldier, to be whipped, it appeared that the colonel had acted unjustifiably and illegally, and out of mere spite and revenge, and the jury gave 150*l.* damages, and a new trial was moved for on the ground that the man appeared to have been moderately punished, and not much hurt, and the damages were disproportioned to his sufferings, the court refused the application, because the man was scandalized and disgraced by such a punishment (*k*).

Evidence in aggravation of damages—Insulting attacks on property or the person.—Surrounding circumstances of aggravation may, as we have seen, be given in evidence, for the purpose of enhancing the damages. Thus, in actions for trespasses upon land, it may be shown that the defendant persisted in trespassing after he had been warned off, or refused to go away after he had been desired to depart, or used threatening or insulting gestures. In all cases of trespass and entry into the house or lands of the plaintiff, a jury may consider not only the mere pecuniary damage sustained by the plaintiff, but also the intention with which the fact had been done, whether for insult or injury (*l*). If a trespass in a house is alleged to have been committed under a false charge and assertion that the plaintiff had stolen property in her house, per quod she was injured in her credit, this circumstance may be given in evidence for the purpose of enhancing the damages (*m*).

Evidence in mitigation of damages.—The fact that the plaintiff has recovered the amount of his loss from an insurance company under a policy of insurance effected by him is not admissible, as we have seen (ante, pp. 791, 792), in reduction of damages. Circumstances cannot be given in evidence in mitigation of damages where they would amount to a complete justification, and might have been pleaded as such; but where they fall short of a complete justification, and do not amount to a defence to the action, they may be given in evidence in mitigation

(*i*) *Doe v. Filliter*, 13 M. & W. 51.

318; ante, pp. 178, 179.

(*k*) *Benson v. Frederick*, 3 Burr. 1847.

(*m*) *Bracegirdle v. Orford*, 2 M. & S.

(*l*) *Abbott, J., Sears v. Lyons*, 2 Stark.

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of damages, as establishing a less aggravated case against the defendant (*n*). Thus, in an action for an assault and battery, and not guilty pleaded, the jury are not at liberty to take into consideration the circumstances that led to the assault, with a view to the reduction of the damages, if those circumstances amount to a justification, and could have been pleaded as such (*o*); but if they merely palliate the character of the offence and mitigate the wrong, they are admissible in evidence in reduction of the damages under the general issue (*p*).

In an action for assaulting the plaintiff and seizing his goods, it may be shown in mitigation of damages that the defendant was a custom-house officer, and that the plaintiff was going away from a vessel with goods liable to duty, without paying the duty, whereupon the defendant detained him and took possession of his goods; for this evidence does not amount to a complete justification, inasmuch as a custom-house officer cannot forcibly take goods from the person without a previous demand (*q*). Where the defendant gave the plaintiff in charge for stealing fat, and it appeared that there was no legal evidence of any felony, but the defendant *bonâ fide* believed that his fat had been stolen, and that the plaintiff had stolen it, and there was reasonable ground for his belief, Best, C. J., allowed the grounds of suspicion to be given in evidence in mitigation of damages (*r*).

In an action for libel and slander, where the plaintiff claims damages on the ground of the disparagement of his character, general evidence of the plaintiff's bad character prior to the publication of the libel is admissible in evidence, as we have seen, in reduction of the damages, but not evidence of the truth of the words spoken, or anything which, if pleaded, would have amounted to a justification (*s*). So in actions for the seduction of daughters and servants, the character of the girl for virtue and morality prior to the seduction may, as we have seen (*ante*, p. 703), be impeached for the purpose of reducing the damages, and it may be shown that she was in the habit of keeping loose company, or indulging in immodest conversation.

Where the defendant wrote a novel, and the plaintiff in reviewing it went beyond the bounds of fair criticism and libelled the defendant and his family, and the defendant thrashed the plaintiff, who brought an action for the assault, it was held that the libel might be given in evidence in mitigation of damages, although it was the subject of another action by

(*n*) Tindal, C. J., *Perkins v. Vaughan*, 5 Sc. N. R. 886. *Speck v. Phillips*, 7 Dowl. 470; 5 M. & W. 281.

(*o*) *Watson v. Christie*, 2 B. & P. 224.

(*p*) *Linford v. Lake*, 3 H. & N. 276; 27 Law, J., Exch. 334.

(*q*) Ld. Denman, C. J., *De Gondouin v. Lewis*, 10 Ad. & E. 120.

(*r*) *Chinn v. Morris*, 2 C. & P. 361.

(*s*) *Ante*, p. 627; Keilw. 203 b. *Dennis v. Pawling*, Vin. Abr. EVIDENCE (1 b) pl. 16. *Watson v. Christie*, 2 B. & P. 224.

the defendant against the plaintiff; but the jury were told that as the defendant had chosen his remedy for the libel by his action for damages, he could not fairly be allowed to take much advantage of it in mitigation of damages in the action for the assault (t).

Where the plaintiff painted a picture, which he designated "The Beauty and the Beast," and caused it to be exhibited in Pall Mall for money, where crowds went to see it, and the defendant went and hacked the picture in pieces, and the plaintiff claimed the full value of the picture, and compensation for the loss of the exhibition, the defendant was permitted to show in mitigation of damages that the picture was a scandalous libel upon the defendant's brother and sister, and the exhibition of it a publick nuisance. "If," observes Lord Ellenborough, "this picture was a libel upon the persons introduced into it, the law cannot consider it valuable as a picture. Upon an application to the Lord Chancellor, he would have granted an injunction against its exhibition, and the plaintiff was both civilly and criminally liable for having exhibited it. The jury, therefore, in assessing the damages must not consider this as a work of art, but must award the plaintiff merely the value of the canvas and paint which formed its component parts" (u).

If a vendor has sold goods to a purchaser, and delivered them to him without payment of the price, and then, fearing that he never will be paid, goes and takes them out of the possession of the debtor, and the latter brings an action for damages, the jury cannot lawfully take into their consideration in the reduction or mitigation of the damages the fact that the goods had not been paid for, and that there was reasonable ground to believe that the purchaser never would pay for them, as it would be equivalent to allowing a set off of a debt in an action of trespass (x).

In actions for damages for seizing goods under irregular or void process, it is no ground for mitigation of damages that a regular judgment had been recovered against the plaintiff. Parties are not to extort even what is justly due by the improper execution of a warrant, and wherever goods are seized under process in a place to which the process does not run, the full value of the goods and all provable damage are recoverable (y).

Joint-trespasses—Recovery of damages from one of several co-trespassers.

—We have already seen, that where several persons commit a trespass in pursuit of one common design, each is answerable for the aggregate damage done by all. This has been held to be the case where a number of persons have associated themselves together for the purpose of hunting

(t) *Fraser v. Berkeley*, 7 C. & P. 625.

(u) *Du Bost v. Beresford*, 2 Campb.

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(x) *Gillard v. Brittan*, 8 M. & W. 575.

(y) *Sowell v. Champion*, 6 Ad. & E.

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over the plaintiff's land (*z*), or have joined in assaulting, beating, or wrongfully imprisoning the plaintiff (*a*). The jury cannot regularly assess several damages for one trespass with which the defendants are jointly charged; for though in fact one was more malicious and did greater wrong than the other, yet all coming to do an unlawful act, the act of one is the act of all the parties present; and it is a rule of law, that what the plaintiff hath laid joint in his declaration, the jury cannot sever (*b*). Whenever, therefore, two or more persons are charged with a joint-trespass, and both or all are found jointly guilty, the jury cannot afterwards assess several damages (*c*). The damages must be assessed against all jointly, though all may not have been equally culpable (*d*). Where an action of trespass was brought against three defendants, and two of them pleaded, and the other let judgment go by default, and several damages were given, the court held that the plaintiff might either take judgment *de melioribus damnis*, or enter a remittitur (*e*).

No contribution can be claimed as between joint-wrongdoers. If, therefore, a plaintiff who has recovered judgment against two defendants for a joint-trespass, levies the whole damages on one of them, that one has no claim for a moiety of the damage from the other (*f*).

Of the recovery of damages when the plaintiff has insured against loss, or has received full indemnity under a contract of insurance.—Where a contract of insurance has been entered into, and a loss has been sustained by the assured for which he has received indemnity from the underwriters, and the assured, has afterwards brought an action against the wrongdoer who occasioned the loss and recovered damages, the insurer or underwriter who has paid the amount of the loss may recover from the assured the amount of the damages he has received from the wrongdoer. Thus, the owner of goods who has intrusted them to a carrier, by land or by water, to be carried, and insures them against loss, and then sustains loss through the negligence of the carrier, is entitled to recover an indemnity on the contract of insurance, and also the full value of the goods from the carrier who has lost them; but he is not entitled to double satisfaction. As soon as he has received from the underwriter or insurer the amount for which he has insured, he becomes a trustee for the latter in respect of any compensation paid or payable from the wrongdoer, and is bound to hand over to the insurer whatever monies he receives from the wrongdoer over and above the actual loss he has sustained, after taking into account the amount he has received under the contract of insurance. The insurer,

(*z*) *Hume v. Oldacre*, ante, p. 182.

(*a*) *Clark v. Newsom*, ante, p. 430.

(*b*) *Brown v. Allen*, 4 Esp. 158.

(*c*) *Hill v. Goodchild*, 5 Burr. 2791.

(*d*) *Eliot v. Allen*, 1 C. B. 18.

(*e*) *Sabin v. Long*, 1 Wils. 30.

(*f*) *Merryweather v. Nizan*, 8 T. R. 186.

moreover, who has paid the loss, is entitled to sue in the name of the insured, for the purpose of recovering from the wrongdoer full compensation for the injury (*g*); and in such action the court will not allow the sum received by the plaintiff on the policy of insurance to be given in evidence in reduction of damages. "If a plaintiff who has received full indemnity for his loss under a contract of insurance, could not recover from a wrongdoer, the latter," observes Tindal, C. J., "would take the benefit of a policy of insurance without paying the premium."

In an action for an injury done to the plaintiff's vessel from negligence in running it down at sea, the fact of the plaintiff's having received from the underwriters the amount of the loss was held to be no answer to the plaintiff's claim for damages (*h*). And where certain insurers had paid the amount of the loss occasioned by the demolition of a house by rioters, it was held that they might maintain an action in the name of the assured against the hundred, under the statute to recover compensation for the injury (*i*).

Of the recovery of money paid under duress, or obtained by extortion.—

Where goods are unlawfully detained, or an injurious act is about to be done to them, or some act which it was the duty of a party to do in respect of them be refused to be done unless money be paid, and the money be paid under protest as the only means of avoiding the immediate injury which would result from the detainer, the injurious act, or the wrongful refusal, the money so paid may be recovered back (*k*).

Recovery of double and treble damages.—Various statutes give, as we have seen, double and treble damages against persons who violate their provisions, such as the statutes prohibiting and punishing a forcible entry into lands and tenements (*l*); or the improper impounding of a distress (*m*); or the levying of a distress where no rent is due (ante, pp. 363, 382); or the rescuing a distress (*n*); or the taking by sheriffs' bailiffs, their officers, deputies, &c., more than the appointed fees or recompense on executions (ante, pp. 480, 491). In these cases, it should be ascertained at the trial whether the amount of damage assessed by the jury is the actual damage sustained, or the statutory damage of double or treble the actual damage; for if the jury assess the damages generally at a certain sum, and there is nothing on the record to show that the jury have found only the single value, the court cannot allow the matter to be explained by affidavit and the *postea* amended; for they are bound to conclude from the *postea* that

(*g*) *Randal v. Cockran*, 1 Ves. sen. 97.

(*h*) *Fates v. Whyte*, 5 Sc. 640; 4 Bing. N. C. 272.

(*i*) *Mason v. Sainsbury*, 3 Doug. 64.
Clark v. Blything, 2 B. & C. 254; 3 D. & R. 489.

(*k*) Coleridge, J., *Glynn v. Thomas*, 11 Exch. 878. Addison on Contracts, 4th edn. pp. 64, 65.

(*l*) 8 Hen. 6, c. 9; Dyer, 214 a.

(*m*) 1 & 2 Ph. & M. c. 12, s. 1.

(*n*) 2 Wm. & M. sess. 1, c. 5, s. 4.

the jury have taken into their consideration and have assessed all the damages that the plaintiff is entitled to recover. But if the jury find the actual or single damage expressly, then the plaintiff may come into court to have the judgment entered up for double or treble value according to the statute (o).

In the case of actions brought by the crown for penalties of double or treble the amount of duty fraudulently kept back, the practice appears to be "for those who attend to the interests of the crown to get the jury to find the actual amount of the duty which ought to have been paid, and then, without any further communication with them, to enter up judgment for double or treble the amount" (p). When the jury have by their verdict found only the single damage, the application to the court to increase the damages to the statutory amount should, it seems, be made within four days of the return of the jury process (q).

New trials in actions of tort on the ground of excessive and outrageous damages.—"I should be sorry to say," observes Lord Mansfield, "that in cases of personal torts, no new trial should ever be granted for damages which manifestly show the jury to have been actuated by passion, partiality, or prejudice. But it is not to be done without very strong grounds indeed, and such as carry internal evidence of intemperance in the minds of the jury" (r). "I always have felt that it is extremely difficult to interfere, and say when damages are too large. You may take twenty juries, and every one of them will differ from 2000*l.* down to 200*l.* Nevertheless, it is now well acknowledged in all the courts of Westminster Hall, that if the damages are clearly too large, the courts will send the inquiry to another jury. Where they interfere, they always go into all the circumstances, put themselves in the situation of the plaintiff and defendant, and examine closely into all their conduct" (s).

"I think further," observes Ashhurst, J., "that before the court can set a verdict aside merely for excess of damages, they ought to be able to ascertain some rule by which the damages are to be measured, and to which the facts may be applied. Where damages depend in anywise upon calculation, the court have some medium to direct them by which they are enabled to correct any mistake of the jury. But where there is no such light to guide them, where the damages depend upon mere sentiment and opinion, the court have no line to go by; and, therefore, it would be very dangerous for us to interfere. We have no right in such a case to

(o) *Baldwyn v. Girries*, Godb. 245. *Sandford v. Clarke*, 2 Chitt. 352. *Buckle v. Bewes*, 4 B. & C. 154. *Baker v. Brown*, 2 M. & W. 199.

(p) *Attorney-General v. Hatton*, 1 M'Clel. 216.

(q) *Masters v. Farris*, 1 C. B. 716. (r) *Gilbert v. Burtenshaw*, Cowp. 230; *Lofft*, 771. *Britton v. South Wales Rail. Co.*, 27 Law, J., Exch. 355.

(s) *Hewlett v. Cruchley*, 5 Taunt. 281.

set up our own judgment against that of the jury, to which the constitution has referred the decision of the question of damages" (t).

But when there is any rule or guidance for the assessment of the damages, and the jury have not been properly directed on the point, or have disregarded the ruling of the judge, and have manifestly given excessive damages, the court will grant a new trial. So where the plaintiff has himself fixed the amount of damage and received it, and the jury give him a sum altogether disproportionate to his own estimate, the court will interpose and grant a new trial, unless the plaintiff consents to reduce the damages to a reasonable amount. Thus, where an importunate beggar having refused to quit the defendant's premises, the defendant ordered him to be apprehended by a constable, which was done, and he remained in custody one night at an inn, and was brought before the plaintiff the following morning, when he demanded compensation, and the defendant told him he might have two sovereigns or go before a justice, and the plaintiff consented to take the money, but said at the same time that he must have something for the keep of his horse, and the defendant then gave him half-a-crown, and directed the butler to give him some refreshment, and the butler did so, and the plaintiff went away, and then brought an action against the defendant, and there being no plea of accord and satisfaction on the record, recovered a verdict with damages to the amount of 100*l.*, it was held that the damages were enormous and disproportionate, on account of the limit which the plaintiff himself had put on his demand in the first instance. "It seems to me," observes Tindal, C. J., "that if accord and satisfaction had been pleaded, it would have been a bar to the action. A verdict for 100*l.* is far beyond the merits, as we cannot but see, on the evidence of the plaintiff himself, who has set the measure on his own damages" (u).

Wherever the facts show that the plaintiff has taken upon himself to avenge his own wrongs, and to retaliate upon the defendant, these facts ought to be taken into consideration by the jury in reduction of damages; and if the jury have not been directed to do this, or have disregarded the direction, and have given excessive damages, the court will grant a new trial. Where an action was brought by a servant for an assault alleged to have been committed upon him by his master, and it appeared that the master had given the servant a slight blow for impertinent behaviour, whereupon the servant turned upon his master and gave him a violent thrashing, and then brought an action for the original assault upon himself, and recovered 40*l.* damages, the court granted a new trial (x).

(t) *Duberley v. Gunning*, 4 T. R. 656.

(u) *Price v. Severn*, 7 Bing. 319.

(x) *Jones v. Sparrow*, 5 T. R. 257.

When also the plaintiff himself has been guilty of misconduct in the matter of his complaint, and does not come into court with clean hands and a fair case for damages, and the circumstance has been overlooked by the jury, and excessive and disproportionate damages have been given, the court will allow the matter to be revised by another jury (*y*). And when a defendant against whom excessive damages have been recovered appears to have been acting in the discharge of some duty, or in the intended execution of an act of parliament, or in the *bond fide* exercise of some power or authority which he supposed that he possessed, and intended to act right, but by mistake did wrong, and the damages are manifestly out of all proportion to the injury actually sustained, the court will interfere and grant a new trial for the purpose of confining the damages within moderate and reasonable limits (*z*).

New trial in actions ex delicto on account of the smallness of the damages.—A new trial will sometimes be granted in actions ex delicto for smallness of damages, when it appears that if the plaintiff is entitled to a verdict at all he is manifestly entitled to much greater damages than have been given by the jury. Thus, where it was proved that by reason of the defendant's negligence in driving an omnibus the plaintiff was run over and his thigh broken, and that the doctor's bill for setting his leg and attending upon him came to 10*l.* 5*s.* 6*d.*, and the jury gave the plaintiff a verdict with a farthing damages, the court ordered a new trial (*a*). But when there is no standard for estimating the damages, and the court are unable to lay down any rule for the guidance of the jury, the court will not grant a new trial, although they may think the damages much too small (*b*).

Arrest of judgment where the plaintiff has a verdict for greater damages than by his own showing he ought to recover.—Whenever some of the damages claimed in the declaration are not legally recoverable, and damages are assessed generally, so that the plaintiff has recovered more damages than he ought, judgment will be arrested (*c*). Where the plaintiff declared against the defendant for seducing the plaintiff's apprentice from his service, and for the loss of the service of the apprentice for the whole residue of the term of apprenticeship, and the jury assessed the damages generally, and it appeared that the term was not expired, judgment was arrested on the ground that the plaintiff was not entitled to recover damages for all the term, as well for the time to come as for the time past, as claimed in the declaration; for the apprentice may return to his master and serve him for the residue of the term yet to

(*y*) Buller, J., 4 T. R. 658.

(*z*) *Eliot v. Allen*, 1 C. B. 40.

(*a*) *Armstrong v. Haley*, 4 Q. B. 918.

(*b*) *Strafford's case*, cited by Kenyon, C. J., 4 T. R. 655.

(*c*) *Prince v. Molt*, 2 Salk. 663.

come, or the master may compel the apprentice by law to serve him for the residue of the term, and the plaintiff ought not to have both the service and damages for the loss of it (*d*).

“The cases seem to establish this principle, that where it is positively and expressly averred in the declaration that the plaintiff has sustained damages from a cause subsequent to the commencement of the action, or previous to the plaintiff’s having any right of action, and the jury give entire damages, judgment will be arrested; but where the cause of action is properly laid, and the other matter either comes under a *scilicet* or is void, insensible, or impossible, and therefore it cannot be intended that the jury ever had it under their consideration, the plaintiff will be entitled to his judgment” (*e*).

The plaintiff can recover no more damages than he has claimed in his declaration, although the jury give him more, for he best knows the measure of his own wrong, and the amount of compensation to which he is entitled. If, therefore, the jury give him more than he claims, he must relinquish the extra damages, or there will be error on the record (*f*).

Inquisition of damages before the sheriff.—When judgment has been suffered by default in an action of tort, a writ of inquiry must be issued for the summoning of a jury, and the assessment of the damages before the sheriff (*g*). The plaintiff must appear at the time and place appointed for the execution of the writ, and prove the amount of damages sustained by him; and he must be careful to confine his claim to matters which can lawfully be made a ground for compensation; for if he gives evidence of losses which are not the natural result of the injury of which he complains, and induces the jury to include in their verdict damages which are not legally recoverable, the court will set aside the inquisition (*h*), unless it appears that no objection was taken by the defendant, and that both parties mutually consented to take the verdict of the jury upon the matters submitted to them. It is the duty, however, of the sheriff to point out to the jury the true grounds and measure of compensation, and if he directs them wrongly, and they go beyond their authority, the court will interfere to set matters right.

(*d*) *Hambleton v. Veere*, 3 Wms. Saund. 170.

(*e*) See the note to *Hambleton v. Veere*, 3 Wms. Saund. 171 c.

(*f*) *Cheveley v. Morris*, 2 W. Bl. 1300.

(*g*) Chitt. Arch. Pr. INQUIRY.

(*h*) *Re Penny*, 7 Ell. & Bl. 668; 26 Law, J., Q. B. 225.

SECTION II.

OF THE RECOVERY OF COSTS IN ACTIONS EX DELICTO.

Award of costs to a successful plaintiff in an action ex delicto.—The expenses that a party has incurred in obtaining his right, such as the fees of counsel, attorneys, and the expenses of witnesses, are termed costs, and these are given by the court and taxed by their officer. "In contemplation of law the word damages emphatically includes costs. It is so considered by Lord Coke, and in various authorities. Costs, therefore, properly fall under the nomen generale of damages" (i).

Before the statute of Gloucester there was no mode of giving a successful plaintiff his costs unless the jury assessed them, and included them in the amount of damages, but that statute (6 Ed. I. c. 1) enables the plaintiff to recover his costs, by the judgment of the court, in all cases where he recovers damages (k). And the stat. 4 Anne, c. 16, for the amendment of the law enabling defendants to plead several matters of defence, enacts (s. 5) that if any such matter shall, upon a demurrer joined, be judged insufficient, costs shall be given at the discretion of the court; or if a verdict shall be found upon any issue in the said cause for the plaintiff, costs shall be given in like manner, unless the judge who tried the issue shall certify that the defendant had a probable cause to plead such matter (l).

Award of costs to a successful defendant.—By the stat. 4 Jac. 1, c. 3, it is further provided, that in all actions where the plaintiff or plaintiffs might have costs, in case judgment should be given for him or them, and the plaintiff, after the appearance of the defendant or defendants, is nonsuited, or a verdict passes against him, the defendant and defendants shall have judgment to recover his and their costs. And by 8 & 9 Wm. 3, c. 11, s. 1, it is further enacted, that where several persons shall be made defendants to any action or plaint of trespass, assault, or false imprisonment, and any one or more of them shall, upon the trial thereof, be acquitted by verdict, every person so acquitted shall recover his full costs of suit, unless the judge shall immediately after the trial, in open court,

(i) Per Ld. Ellenborough, C. J., *Phillips v. Bacon*, 9 East. 303; Co. Litt. 257 a.

(k) *Jackson v. Calesworth*, 1 T. R. 72.

(l) As to costs under this statute, see *Partridge v. Gardner*, 4 Exch. 306. *Howell v. Rodbard*, ib. 311.

certify upon the record under his hand that there was reasonable cause for making such person a defendant. And (s. 2) that if upon any demurrer, either by the plaintiff or defendant, judgment shall be given against such plaintiff; or if, after judgment given for the defendant, the plaintiff shall sue a writ of error, and the judgment shall be affirmed, or the writ be discontinued, or the plaintiff shall be pursued therein, the defendant shall have judgment to recover his costs, and have execution for the same.

Sect. 32 of 3 & 4 Wm. 4, c. 42, further enacts, that where several persons shall be made defendants, and any one or more of them shall have a nolle prosequi entered as to him or them, every such person shall recover his reasonable costs; and if a verdict shall pass (s. 32) for any one or more of them, every such person shall have judgment for and recover his reasonable costs, unless the judge shall certify that there was reasonable cause for making him a defendant. And by s. 34 of this statute it is enacted, that in all writs of sci. fa. the plaintiff, obtaining judgment on an award of execution, shall recover his costs upon a judgment by default, as well as upon a judgment after plea pleaded, or demurrer joined, and that where judgment shall be given either for or against a plaintiff, or for or against a defendant, upon demurrer in such action, the successful party shall have his costs.

Taxation of costs.—By the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76, s. 223), the judges, or eight or more of them, with their chiefs, are empowered to make general rules and orders for fixing costs, apportioning costs of issues, and for enforcing uniformity of practice in the allowance of costs. "Costs are an indemnity; they are given to the person who receives them to indemnify him in respect of the cost of some proceeding which the other person has compelled him to take. They are not a punishment on the party who is to pay them, nor a bonus to the party who is to receive them. The principle, therefore, is to find out the extent of the damnification, and then you can find out the amount of costs you are to allow" (n). They ought to be a fair indemnity to the party, and if they are not so, the rules which govern the taxation of costs ought to be altered (o).

A plaintiff who has been kept attending as a material witness on his own cause, may be allowed the expenses of his attendance, for the reasonable expenses to which a plaintiff is put by being obliged to attend and be examined as a witness to seek redress for an injury should be thrown upon the wrongdoer (p). And if the plaintiff has been obliged to quit

(n) Bramwell, B., *Harold v. Smith*, 29 Law, J., Exch. 141.

(o) Pollock, C. B., *Doe v. Filliter*, 13

M. & W. 51.

(p) *Howes v. Barber*, 18 Q. B. 588; 21 Law, J., Q. B. 254.

his vessel and abandon an intended voyage, and remain in England to give evidence, the reasonable and necessary expenses of his maintenance may be allowed him (q). And where the defendant's presence in court is reasonably necessary for his defence, the expense of his attendance will be allowed if the defence is successful (r).

When there are several defendants who defend jointly, and one of them gets a verdict, he will be entitled to an aliquot portion of the joint costs of the defence, and to any additional costs that were reasonably necessary for his defence (s). If several defendants defend separately by separate attorneys, and a verdict is given in favour of some or all of them, each successful defendant is entitled to the costs of his defence (t).

Where the jury, being unable to agree upon their verdict, are discharged by the judge, and the plaintiff afterwards discontinues, the defendant is not entitled to the costs of the trial (u).

The court is bound not to allow a successful party all the expense he may have thought proper to incur when it can see that part of it has been needless. Where there is matter ascertained in the cause, whether appearing upon the face of the proceedings or established by the statement of the judge, founded upon his judicial knowledge of the facts, whereby the master is satisfied that witnesses called by the successful party have been wholly useless, he ought to disallow the expenses of such evidence (x).

Costs of particular issues.—The costs of any issue, either of fact or of law, follow the finding or judgment upon such issue, and will be adjudged to the successful party, whatever may be the result of the other issues (y). But when issues in law and fact are raised, the costs of the several issues, both in law and fact, will follow the finding or judgment; and if the party entitled to the general costs of the cause obtain a verdict on any material issue, he will also be entitled to the general costs of the trial; but if no material issue in fact be found for the party otherwise entitled to the general costs of the cause, the costs of the trial will be allowed to the opposite party (z).

The party who is entitled to the costs of the cause is entitled to the costs of evidence applicable to any issue or issues found for him, though

(q) *Ansett v. Marshall*, 22 Law, J., Q. B. 118.

(r) *Flower v. Gardner*, 3 C. B., N. S. 187; 27 Law, J., C. P. 56.

(s) *Griffiths v. Kynastor*, 2 Tyr. 757. *Bartholomew v. Stephens*, 5 M. & W. 386. Gray on Costs, 96.

(t) *Newton v. Boodle*, 4 C. B. 359. *Gambrell v. Falmouth*, 5 Ad. & E. 403.

(u) *Wall v. Lond. & S. W. R. Co.*, 11

Exch. 696.

(x) *Reynolds v. Harris*, 3 C. B., N. S. 291; 28 Law, J., C. P. 26.

(y) 15 & 16 Vict. c. 76, s. 81.

(z) Reg. Gen. Hil. Term, 16 Vict. No. 62; 1 Ell. & Bl. app. xiii. As to this, see Chitty's Arch. Fr. 463; and as to costs in general, see Scott's Costs in the Superior Courts of Common Law, &c.

also applicable to an issue or issues found against him, and the other party is entitled only to the costs of evidence exclusively applicable to an issue or issues upon which he has succeeded. Costs apart from costs in the cause are only given by the rule of court and the statute to a party succeeding upon an issue (a). It is for the master to ascertain whether any and what costs have been incurred as to part of the issue found for the defendant, and when they can be ascertained to have been incurred relative to that only, to tax them to the defendant, though the plaintiff has succeeded, and is entitled to the general costs of the cause (b).

Where a plea consists of several parts, the party succeeding on any one of those parts is entitled to have that part treated as if it were a separate plea raising a several issue (c).

Costs on a stay of proceedings.—Upon a summons to stay proceedings, on payment of a certain sum and costs, if the plaintiff refuses to take the amount offered in discharge of his claim, but afterwards accepts it, there is no absolute rule which entitles the defendant to his costs incurred subsequently to the summons (d). Where a suit is altogether frivolous and vexatious, as in the case of an action in the superior courts for a sum under 40s., the court will stay the proceedings (e).

Costs on arrest of judgment, or judgment non obstante veredicto.—By the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), it is enacted (s. 145), that upon an arrest of judgment, or judgment non obstante veredicto, the court shall adjudge to the party against whom such judgment is given the costs occasioned by the trial of any issues of fact arising out of the pleading for defect of which such judgment is given, upon which such party shall have succeeded, and such costs shall be set off against any money or costs adjudged to the opposite party, and execution may issue for the balance, if any (f).

Where the court has no jurisdiction it has no power to give costs.—When a case has been dismissed by a court of law for want of jurisdiction, the court cannot give judgment for costs (g). By the County Court Act (9 & 10 Vict. c. 95, s. 79), it is enacted, that if the plaintiff shall not make proof of his demand to the satisfaction of the court, it shall be lawful for the judge to nonsuit the plaintiff, or to give judgment for the defendant; and in case where the defendant shall appear and shall not admit the demand, to award to the defendant by way of costs such sum as the judge shall think fit; and it has been held that this enactment does

(a) *Reynolds v. Harris*, 3 C. B., N. S. 289.

(b) *Traherne v. Gardner*, 8 Ell. & Bl. 182.

(c) *Davis v. Thomas*, 5 Jur. N. S. 709.

(d) *Wallon v. Brown*, 3 H. & N. 879.

(e) *Stuart v. Cawse*, 5 C. B., N. S. 737.
Wellington v. Arters, 5 T. R. 64.

(f) *Whaley v. Laing*, 8 W. R. 439.

(g) *Strader v. Graham*, 18 How. Rep. Supreme Court, U. S. 602.

not empower the judge to nonsuit and award costs when the case is out of his jurisdiction, for the plaintiff might be able conclusively to prove the cause of action brought before the court, but for the objection to the jurisdiction on the part of the defendant. Under such circumstances the court has merely power to declare its own incompetency to try the cause, and to direct that the suit shall abate, the plea to the jurisdiction being a plea in abatement of the suit. "We are of opinion," observes Pollock, C. B., "for the same reasons, that the provision over costs in the 88th section of the same act only applies to cases within the jurisdiction of the county court to hear and determine" (*h*).

Of staying proceedings in a second action until the costs of a former action have been paid.—Where a party has brought an action, and has had an opportunity of trying that action upon the merits, and has either failed upon the merits or has withdrawn his case, and afterwards brings a second action for the same cause, leaving the costs of the first action unpaid, the court will interpose its authority to prevent him from so harassing his opponent and stay the proceedings in the second action (*i*). In determining the question, whether the second action is for the same cause as the first, the court will look at all the surrounding circumstances, to see whether the difference, if there be any, between the two actions is merely colourable, or whether the second action is for a substantially different cause (*k*). And although the parties be not the same, yet if it appears that the second action is on the same title, and for the same cause of action, the court will stay the proceedings until the costs of the first action have been paid (*l*). But the court will not interfere where it appears that the plaintiff was prevented from trying the first action on the merits, and that the second action has not been brought oppressively and vexatiously (*m*).

Effect on the question of costs of withdrawing a juror at the trial.—If on the trial of a cause a juror is withdrawn by consent of the parties, each party pays his own costs (*n*); there is an end to the action, and no future action can be brought for the same cause, whatever may be the understanding and belief of the parties or their attorneys at the time the step is taken. If, therefore, a second action is brought, the court will stay the proceedings therein (*o*).

In what cases the plaintiff is entitled in the superior courts to no more costs

(*h*) *Lawford v. Partridge*, 1 H. & N. 620; 20 Law, J., Exch. 147.

(*i*) *Weston v. Withers*, 2 T. R. 511. *Crawley v. Impey*, 8 Taunt. 407; Chitty's Arch. Pr. 1200.

(*k*) *Hoare v. Dickson*, 7 C. B. 164.

(*l*) *Morgan v. Nicholl*, 3 H. & N. 215.

(*m*) *Danvers v. Morgan*, 17 C. B. 530, where it was erroneously supposed that the interference of the court was limited to actions of ejectment.

(*n*) *Stodhart v. Johnson*, 3 T. R. 657.

(*o*) *Gibbs v. Ralph*, 14 M. & W. 804; 15 Law, J., Exch. 7.

than damages.—By 43 Eliz. c. 6, s. 2, it is enacted, that if upon any action personal to be brought in any of her Majesty's courts at Westminster (not being for any title or interest of lands, nor concerning the freehold or inheritance of any lands, nor for any battery), it shall appear to the judges for the same court, and so signified or set down by the justices before whom the same shall be tried, that the debt or damages to be recovered therein in the same court shall not amount to the sum of 40s. or above; that in every such case the judges and justices before whom any such action shall be pursued, shall not award for costs to the party plaintiff any greater or more costs than the sum of the debt or damages so recovered shall amount unto, but less at their discretions.

So much of this statute as relates to costs in actions of trespass or case has been repealed by 3 & 4 Vict. c. 24, s. 1, which wholly deprives the plaintiff of costs where he recovers less than 40s. damages, unless the judge or presiding officer certifies that the action was brought to try a right, or that the trespass or grievance was wilful and malicious (post, p. 804).

Where no more costs than damages can be recovered in actions of slander.—By 21 Jac. 1, c. 16, s. 6, it is further enacted, that in all actions for slanderous words, if the jury upon the trial of the issue in such actions, or the jury that shall inquire of the damages, do find or assess the damages under 40s., the plaintiff shall have and recover only so much costs as the damages so given or assessed amount unto. In the construction of this statute it was held, that where the words are in themselves not actionable, but the action is maintainable by reason of special damage sustained by the plaintiff, the statute does not apply, and the plaintiff is consequently entitled to full costs, though the damages are under 40s., for it is not the words but the special damage which is the cause of the action; but that when the words are actionable in themselves, and the special damage is laid by way of aggravation, then if the damages are under 40s. there should be no more costs than damages, for the action is properly an action for words within the statute (*p*).

The importance of this distinction, it has been observed, has been much diminished by the statute 3 & 4 Vict. c. 24, s. 2, which enacts (post, p. 804), that if the plaintiff in any action on the case in the superior courts recovers less than 40s. damages, he shall not be entitled to any costs unless the judge or presiding officer certifies in manner therein provided that the grievance was wilful and malicious. The distinction, however, continues to be material in this respect. It has been held, that where the words are actionable in themselves the judge who tries the

cause has no power to certify, and the plaintiff is consequently entitled to no more costs than damages (*q*); but where the words are not actionable, and the action is maintainable only by reason of the special damage, the judge or presiding officer may certify under the statute 3 & 4 Vict. c. 24, s. 2 (post, p. 804), so as to entitle the plaintiff to full costs (*r*).

Where to a declaration for slander the defendants pleaded not guilty and a justification, and at the trial no evidence was offered upon the second issue, and a verdict was given thereon for the plaintiff; but under the issue upon the first plea of not guilty the defendants proved that the words spoken were a privileged communication, and upon that issue the verdict was for the defendants, it was held that the statute of James did not affect the case, and that the plaintiff was entitled to his full costs upon the second issue (*s*).

Where to an action for a libel in a newspaper the defendant pleaded the insertion of an apology and payment of 40s. into court (ante, pp. 614, 615), and the jury found that the apology was not sufficient, but that the money paid into court was sufficient to cover the damage sustained, and thereupon the judge directed a verdict for the plaintiff with 1s. damages, it was held that the plaintiff was deprived of costs, and that the plea not being proved, the payment into court was not warranted by law, and the defendant ought to have his money back again. "The damages," observes Pollock, C. B., "should have been assessed wholly irrespective of the plea" (*t*).

Where the plaintiff has in fact recovered more than 40s. by bringing the action, the case is not within the statute. If, therefore, as much as 40s. has been paid into court by the defendant, and the plaintiff, not considering it enough, goes on with his action, and recovers only a shilling damages beyond the amount paid into court, the plaintiff is not deprived of his costs, by a certificate from the judge that the verdict was for one shilling and no more (*u*).

The judge, by the language of this statute, is the only person who can grant the certificate. In case, therefore, of a judgment by default, and inquisition of damages before the sheriff, no certificate can be granted under this statute, as the sheriff is not invested with the power to grant it (*x*).

In what cases the certificate of a judge or presiding officer is necessary to enable the plaintiff to recover his costs.—By the statute 3 & 4 Vict. c. 24,

(*q*) *Goodall v. Ensell*, 2 Cr. M. & R. 249.

(*r*) *Foster v. Pointer*, 9 C. & P. 721; 8 M. & W. 308. *Pryme v. Brown*, 4 Sc. N. R. 739; 1 Wms. Saund. note to *Craft v. Boile*, 240 a.

(*s*) *Skinner v. Shoppee*, 8 Sc. 275; 6 Bing. N. C. 131.

(*t*) *Lafone v. Smith*, 4 H. & N. 168. *Newton v. Rowe*, 1 C. B. 187.

(*u*) *Richards v. Bluck*, 6 C. B. 448.

(*x*) *Claridge v. Smith*, 4 Dowl. P. C. 584.

s. 1, repealing the statute 43 Eliz. c. 6, so far as it relates to costs in actions of trespass or case, and so much of 22 & 23 Car. 2, c. 9, as relates to costs in personal actions, it is enacted (s. 2), that if the plaintiff in any action of trespass or trespass on the case in any of the courts at Westminster, or the court of Common Pleas at Lancaster or Durham, shall recover by the verdict of a jury less than 40s. damages, the plaintiff shall not be entitled to recover any costs whatever, whether it shall be given upon an issue tried, or judgment shall have passed by default, unless the judge or presiding officer before whom such verdict shall be obtained, shall immediately afterwards certify on the back of the record, or on the writ of trial, or writ of inquiry, that the action was really brought to try a right, besides the mere right to recover damages for the trespass or grievance for which the action has been brought, or that the trespass or grievance in respect of which the action is brought was wilful and malicious. But the act is not to deprive any plaintiff of costs in an action for trespasses on lands and dwellings after notice not to trespass (post, p. 807).

Under this statute, the under-sheriff who presides at a writ of inquiry of damages after judgment by default, may grant the certificate, but he should sign it in the name of the sheriff, and not in his own name (*y*).

Cases in which the judge or presiding officer has power to certify that the action was brought to try a right.—Wherever a defendant in an action for a trespass upon the plaintiff's land sets up a *bond fide* claim to the enjoyment of some easement, privilege, or profit thereon, such as a right to take water from the plaintiff's well, or to dig turves on the plaintiff's common (ante, c. 2), and has any colourable ground for the claim, the action is brought to try a right, and the judge or presiding officer ought to certify to that effect upon the record (*z*). In actions for a nuisance, there is in general a question of right between the parties. The action may be brought to recover damages for the infringement of an acknowledged right, or to try whether the defendant has a right to do the act of which the plaintiff complains. In actions for a nuisance to a house, where the plaintiff asserts his right to occupy his house free from the nuisance caused by the defendant, and the latter declares that the acts complained of are not a nuisance, a right beyond the mere right to recover damages comes in question, and the judge has power to certify.

An action may be brought to try a right, though nothing appears on the record to indicate such an intention. Wherever the plaintiff seeks to negative the right of the defendant to do the act of which he complains,

(*y*) *Stroud v. Watts*, 2 C. B. 920.

(*z*) *Tyler v. Bennett*, 5 Ad. & E. 377. *Macdougall v. Paterson*, 11 C. B. 755.

the action may be brought to try a right beyond the mere question of damages (a). "Suppose," observes Tindal, C. J., "a case can be put of a declaration in trespass or case (although I do not think it can) in which a right could not by possibility come in question, still, if it should appear to the judge that the plaintiff had really intended to try a right, I conceive that the judge would have power to certify. If an action be really brought to try a right, whether it is calculated for that purpose or not, the party is within the letter, and, as it seems to me, also within the spirit of the act" (b).

Wherever the record is so framed that a right beyond the mere right to recover damages *may* come in question, the court will not inquire whether or not the judge has exercised a sound discretion in granting a certificate. It is a matter entirely for the discretion of the judge, upon the effect of the evidence and the course taken at the trial (c).

Within what time the certificate must be granted under this statute.—The words "immediately afterwards," in s. 2 of the statute 3 & 4 Vict. c. 24, do not mean that the certificate is to be granted the very instant afterwards. "We interpret the words to mean," observes Lord Abinger, "within such reasonable time as will exclude the danger of intervening facts operating upon the mind of the judge, so as to disturb the impression made upon it by the evidence in the cause." Where, therefore, the certificate was given by the judge after the jury had been dismissed, and the court adjourned, and the judge had retired to his lodgings in the town, it was held that the certificate was well given (d). So where the under-sheriff, as presiding officer, on the execution of a writ of inquiry, on being asked for a certificate, said he would take time to consider, and adjourned the court, and subsequently in the evening of the same day gave a certificate, it was held that the time taken by the under-sheriff to consider his judgment was perfectly reasonable. "I do not," observes Lord Abinger, "limit the reasonable time to the interval before the trial of another cause, or even necessarily to the same day" (e). But whenever the under-sheriff certifies, the certificate must be given before the return of the writ of inquiry (f).

Where, on an application for a certificate under the statute 3 & 4 Vict. c. 24, the judge said that he would certify, if necessary, that the right came in question, and made a memorandum to that effect on his notes, it was held that a certificate subsequently indorsed on the record, had the same effect as if it had been indorsed at the trial (g).

(a) *Shuttleworth v. Cocker*, 1 M. & Gr. 839; 2 Sc. N. R. 47.

(b) *Morison v. Salmon*, 2 M. & Gr. 394.

(c) *Bosanquet, J., Shuttleworth v. Cocker*, 1 M. & Gr. 837.

(d) *Thompson v. Gibson*, 8 M. & W. 287.

(e) *Page v. Pearce*, 8 M. & W. 679.

(f) *Knapman v. Pryer*, 1 H. & N. 721.

(g) *Jones v. Williams*, 13 M. & W. 423.

Power of the judge or presiding officer to certify, to deprive the plaintiff of costs in certain cases where the plaintiff has recovered less than 5l.—By the bill now before parliament for the further amendment of the mode of pleading in, and enlarging the jurisdiction of, the superior courts of common law, it is proposed to be enacted (s. 56), that when the plaintiff in any action for an alleged wrong in any of the superior courts recovers by the verdict of a jury less than 5l., he shall not be entitled to recover or obtain from the defendant any costs whatever in respect of such verdict, whether given upon any issue or issues tried, or judgment passed by default, in case the judge or presiding officer before whom such verdict is obtained shall immediately afterwards certify on the back of the record, or on the writ of trial or writ of inquiry, that the action was not really brought to try a right besides the mere right to recover damages, and that the trespass or grievance in respect of which the action was brought was not wilful and malicious, and that the action was not fit to be brought.

Costs in the superior courts in cases of wilful and malicious trespass.—By 8 & 9 Wm. 3, c. 11, s. 4, it is further enacted, that in all actions of trespass in any of her Majesty's Courts of Record at Westminster, wherein at the trial of the cause it shall appear and be certified by the judge under his hand, upon the back of the record, that the trespass upon which any defendant shall be found guilty, was wilful and malicious, the plaintiff shall recover not only his damages but his full costs of suit. And the statute 3 & 4 Vict. c. 24, s. 2, deprives plaintiffs in the superior and palatine courts of their costs, if they recover by the verdict of a jury less than 40s., unless the judge or presiding officer (ante, p. 804) shall immediately afterwards certify on the back of the record, &c., that the trespass or grievance in respect of which the action was brought was wilful and malicious. Coupling the provisions of this statute with those of 8 & 9 Will. 3, c. 11, s. 4, the only alterations made are, that the certificate must be given immediately, and that the plaintiff is totally deprived of costs instead of obtaining, as under the statute of Wm. 3, no more costs than damages (h).

A trespass which is committed after notice may fairly be deemed to be a wilful and malicious trespass. Originally the judges considered themselves absolutely bound to certify in all cases where the trespass was after notice, but it is now held that the judge has a discretion in the matter; but the discretion will generally be exercised in favour of the plaintiff when notice has been given. Where the defendant went to the plaintiff's house to make a seizure under process from the county court,

(h) Parke, B., *Sherwin v. Swindall*, 12 M. & W. 789.

and being refused admittance he unlawfully broke open the outer door of the plaintiff's house with an axe, after a warning not to do so, and the jury gave only 40s. damages, the judge certified that the trespass was wilful and malicious, so as to give the plaintiff his full costs (i).

What amounts to a wilful and malicious trespass.—If a man inadvertently walk across another person's close, and the latter bring an action, the action would be frivolous, and the judge ought not to certify. But if the walking across the close be proved to have been done audaciously, and with a view of annoying the owner or his family, then the judge would be justified in granting the plaintiff a certificate that the trespass was wilful and malicious (k).

Recovery of costs in the superior courts in actions of trespass upon real property, after notice not to trespass thereon has been given.—By 3 & 4 Vict. c. 24 (ante, pp. 804, 805), it is further enacted (s. 3), that nothing therein contained shall deprive any plaintiff of costs in any action brought for a trespass over lands, commons, wastes, closes, woods, plantations or inclosures, or for entering into any dwellings, out-buildings, or premises, in respect of which any notice not to trespass thereon or therein shall have been previously served by or on behalf of the owner or occupier of the land trespassed over or upon, or left at the last reputed or known place of abode of the defendant or defendants in such action. The plaintiff, therefore, is entitled as of right to his full costs in an action for a trespass committed after notice, though he recover less than 40s. damages, and though the judge has refused to certify. The proper course for the plaintiff to adopt to entitle himself to costs is by entering a suggestion on the record, to the effect that the trespass was committed after notice, leaving the defendant to traverse the suggestion if so advised (l).

If the defendant has a right of way over the plaintiff's land a general notice not to trespass will not entitle the plaintiff to his costs. The notice should be framed so as to warn the defendant not to deviate from the way. "The plaintiff," observes Patteson, J., "should say in effect, It is true you have a right of way over a particular part of the close, but you are to take care that you do not go out of that way. Here he has given a notice not to come upon the close at all" (m).

Costs in the superior courts in actions for wilful and malicious grievances.—Whenever the judge certifies that the grievance for which the action was brought was wilful and malicious the plaintiff is entitled

(i) *Sherwin v. Swindall*, 13 M. & W. 830.
783.

(k) *Shuttleworth v. Cocker*, 1 M. & Gr.

(l) *Howyer v. Cook*, 4 C. B. 236.

(m) *Bourne v. Alcock*, 4 Q. B. 625.

to his costs. This has been held to be the case in an action for libel, where the plaintiff recovered a farthing damages, and the judge certified that the grievance was wilful and malicious (n).

Costs in the superior courts in actions against justices.—By 11 & 12 Vict. c. 44, s. 13, it is enacted, as we have seen (ante, p. 548), that where the plaintiff in an action against a justice of the peace for anything done by him in the execution of his office is entitled to recover damages, he is in certain cases entitled to no costs of suit whatever, if it is proved that he was actually guilty of the offence of which he was convicted, or that he was liable by law to pay a sum of money he was ordered to pay, and that he had undergone no greater punishment than that assigned by law for the offence of which he was so convicted, or for non-payment of the sum he was ordered to pay. By s. 14 of this statute it is further enacted, that if the plaintiff recovers a verdict or the defendant allows judgment to pass against him by default, the plaintiff shall be entitled to costs as if the act had not been passed; or if in such case it be stated in the declaration, or in the summons and particulars in a county-court action, that the act complained of was done maliciously and without reasonable and probable cause, the plaintiff if he recover a verdict for any damages, or if the defendant allow judgment to pass against him by default, shall be entitled to his full costs of suit, to be taxed as between attorney and client; and that in every action against a justice of the peace for anything done by him in the execution of his office, the defendant, if he obtain judgment upon verdict, or otherwise, shall in all cases be entitled to his full costs in that behalf, to be taxed as between attorney and client.

The statute 24 Geo. 2, c. 44, s. 6, enacts, as we have seen, that the constable or officer executing a justice's warrant shall, in a certain event, be sued only in conjunction with the justice or justices who executed the warrant, and that the jury on proof of the warrant shall find for the constable (ante, p. 546); and as regards the costs it is enacted, that if the verdict be given against the justice, the plaintiff shall recover his costs, to be taxed so as to include the costs the plaintiff is liable to pay to the defendant for whom such verdict shall be found.

Costs in actions against constables and officers, and parties acting or intending to act in the execution of the powers and provisions of an Act of Parliament.—In actions against special constables in respect of things done by them in the intended execution of the provisions of the stat. 1 & 2 Wm. 4, c. 41, the plaintiff, though he obtains a verdict, cannot (s. 19) recover any costs from the defendant unless the judge before whom the trial takes

(n) *Foster v. Pointer*, 9 C. & P. 721; 8 M. & W. 308.

place certifies his approbation of the action and of the verdict; and generally when an action is brought against a constable or a police-officer, or against private individuals, for anything done in pursuance of an act of parliament, or with the *bond fide* intention of executing the provisions of some particular statute (ante, pp. 411, 412), and a verdict passes for the defendant, or the plaintiff becomes non-suit or discontinues the action after issue joined, or if, upon demurrer or otherwise, judgment is given against the plaintiff, the defendant is entitled to recover his full costs as between attorney and client, and has the like remedy for the same as any defendant has in ordinary cases (o).

Judge's certificate for costs in actions for things done in supposed pursuance of the Malicious Trespass Act.—By the protecting clause of the Malicious Trespass Act (7 & 8 Geo. 4, c. 30, s. 41) it is enacted, that though a verdict shall be given for the plaintiff in an action against any person for anything done in pursuance of the act (ante, p. 412), such plaintiff shall not have costs against the defendant unless the judge before whom the trial shall be shall certify his approbation of the action and of the verdict obtained thereupon. If, therefore, the judge does not at the trial give a certificate of approbation in conformity with the statute, the defendant is entitled to a suggestion of the fact on the record, in order to deprive the plaintiff of costs which he would otherwise recover (p).

Costs in the superior courts in actions against executors.—By 3 & 4 Wm. 4, c. 42, s. 31, it is enacted, that in every action brought by any executor or administrator in right of the testator or intestate, such executor or administrator shall, unless the court in which such action is brought, or a judge of any of the superior courts, shall otherwise order, be liable to pay costs to the defendant in case of being non-suited or a verdict passing against the plaintiff and in all other cases in which he would be liable if such plaintiff were suing in his own right upon a cause of action accruing to himself; and the defendant shall have judgment for such costs, and they shall be recovered in like manner (q).

Costs in the superior courts in actions for selling impounded cattle, under 5 & 6 Wm. 4, c. 59 (ante, p. 375), are not recoverable by a successful plaintiff unless the judge before whom the action was tried certifies his approbation of the action (s. 19) and of the verdict. But full costs of suit as between attorney and client may (s. 19) be recovered if a verdict passes for the defendant, or the plaintiff becomes non-suit or discontinues, or if on demurrer or otherwise judgment is given against him.

(o) See 5 & 6 Wm. 4, c. 76, s. 133; 1 & 2 Wm. 4, c. 41, s. 10.

(p) *Norwood v. Pill*, 28 Law, J., Exch. 212.

(q) As to costs in actions by and against executors, see *Gray on Costs*, 227-235.

Costs in actions for duties and penalties at the suit of the Crown.—By 16 & 17 Vict. c. 107, s. 263, it is enacted, that in all suits or proceedings at the suit of the Crown for the recovery of any duty or penalty, or the enforcement of any forfeiture under that act, or any act relating to the customs, the parties thereto shall be entitled to recover costs against each other, in the same manner as if such suits or proceedings were conducted and had between subject and subject.

Cases where the plaintiff is deprived of costs in the superior courts by the County Courts Act.—By the County Courts Act, 9 & 10 Vict. c. 95, s. 129, it is enacted, that if any action shall be commenced after the passing of that act in any of the superior courts for any cause (excepting certain causes specified in s. 128 of that statute, and presently set forth, post, p. 812), for which a plaint might have been entered in a county court, and a verdict shall be found for the plaintiff for a sum less than 20*l.* if the action is founded on contract, or less than 5*l.* if it be founded on tort, the plaintiff shall have judgment to recover that sum only, and no costs; and if a verdict shall not be found for the plaintiff, the defendant shall be entitled to his costs as between attorney and client, unless, in either case, the judge who tries the cause shall certify on the back of the record that the action was fit to be brought in such superior court.

If the action brought in the superior court is one of the excepted actions, such as an action brought by a plaintiff who resided more than twenty miles from the defendant at the time of the commencement of the action, and the plaintiff is non-suited, the defendant is not entitled to have his costs taxed on the higher scale as between attorney and client; "for it is quite impossible to suppose, that while the 128th section (post, p. 812), gives the plaintiff the right to sue in the superior court, the legislature, by the 129th section, intended to subject him to costs as between attorney and client if he exercised that right" (r).

The judge may, under this section, certify for costs at any time after trial (s); but the under-sheriff or presiding officer, on a writ of trial, has no power to certify after the return of the writ, his jurisdiction over the cause being then at an end (t).

By the statute 18 & 14 Vict. c. 61, s. 11, it is further enacted, that if in any action commenced in her Majesty's superior courts of record in covenant, debt, detinue, or assumpsit, not being an action for breach of promise of marriage, the plaintiff shall recover a sum not exceeding 20*l.*; or if, in any action commenced after the passing of that act, in

(r) Pollock, C. B., *Mason v. Tucker*, 4 H. & N. 537.

(s) Martin, B., *ib.* 538.

(t) *Knapman v. Pryer*, 1 H. & N. 721.

any of her Majesty's superior courts of record in trespass, trover, or case, not being an action for malicious prosecution, or for libel, slander, or seduction, the plaintiff shall recover a sum not exceeding 5*l.*, the plaintiff shall have judgment to recover such sum only, and no costs, except in the cases thereafter provided, and except in the case of a judgment by default, and that it shall not be necessary to enter any suggestion on the record to deprive such plaintiff of costs, nor shall any such plaintiff be entitled to costs by reason of any privilege as attorney or officer of such court, or otherwise. It is then provided (s. 12) that if the plaintiff in any such action shall recover less than 5*l.* by verdict, and the judge or other presiding officer before whom such verdict shall be obtained shall certify on the back of the record that it appeared to him at the trial that the cause of action was one for which a plaint could not have been entered in such county court, or that it appeared to him at the trial that there was a sufficient reason for bringing the action in the court in which it was brought, the plaintiff shall have the same judgment to recover his costs that he would have had if the act had not been passed (u). Section 13 of this statute further required the court or a judge at chambers to make an order for costs in cases where it was shown that the action was one of the excepted actions; but this section has been repealed by 15 & 16 Vict. c. 54, s. 4, whereby it is enacted, that in any action in which the plaintiff shall not be entitled to recover his costs by reason of the provisions of the 11th section of the stat. 13 & 14 Vict. c. 61, whether there be a verdict in such action or not, if the plaintiff shall make it appear to the satisfaction of the court in which such action was brought, or to the satisfaction of a judge at chambers, upon summons, that such action was brought for a cause in which concurrent jurisdiction is given to the superior courts by 9 & 10 Vict. c. 95, s. 128 (post, p. 812), or for which no plaint could have been entered in any such county court, or that such action was removed from a county court by certiorari, or that there was sufficient reason for bringing the action in the court in which it is brought, the court or the judge at chambers shall thereupon, by rule or order, direct that the plaintiff shall recover his costs, and thereupon the plaintiff shall have the same judgment to recover his costs that he would have had if the act had not been passed.

The plaintiff, therefore, is deprived of his costs where he recovers less than 20*l.* in an action on contract, or a sum not exceeding 5*l.* in an action of tort, not being one of the excepted actions, unless he obtains a

(u) This certificate may be granted by the judge after the assizes at which the trial has taken place. *Bennett v. Thomp-*

son, 6 Ell. & Bl. 663; 25 Law, J., Q. B. 378.

certificate under sect. 12, or a rule or order under sect. 4 of these statutes (*x*).

It is the duty of the court or judge, on satisfactory proof being given that the action is an excepted action, to make the necessary rule or order for the costs (*y*).

When the foundation of the action is a contract, and no right to sue exists independently of the contract, the action, though in form *ex delicto*, is in substance an action *ex contractu*, and the plaintiff must, if the action is not an excepted action, (post, p. 813), recover more than 20*l.*, or obtain a certificate, &c., in order to entitle himself to costs in the superior courts (*z*).

Where the plaintiff in the first count of his declaration complained of an assault, and in a second count for slander, and recovered 5*l.* damages on the first count, but failed on the second, it was held that he was entitled to no costs without a certificate or judge's order (*a*).

Costs on demurrer in frivolous actions in the superior courts.—The prohibition as regards costs in the County Court Acts applies to issues of law as well as of fact, so that if in an action of tort there be an issue in fact and an issue in law, both of which are determined in favour of the plaintiff, but the damages recovered are less than 5*l.*, the plaintiff is wholly deprived of costs, unless he obtains a certificate, or shows the action to be an excepted action (*b*).

Excepted actions, in which the plaintiff's right to costs in the superior courts remains unaffected by the County Courts Acts.—By 9 & 10 Vict. c. 95, s. 128, it is enacted, that all actions and proceedings which before the passing of that act might have been brought in the superior courts, where the plaintiff dwells more than twenty miles from the defendant, or where the cause of action did not arise wholly or in some material point (*c*) within the jurisdiction of the court within which the defendant dwells, or carries on his business at the time of the action brought (*d*); or where any officer of the county court shall be a party, except in respect of any claim to any goods and chattels taken in execution of the process of the court, or the proceeds or value thereof, may be brought and determined in any such superior court, at the election of the party suing, as if that act had not been passed. But to recover his costs in these cases the plaintiff must, as we have seen, show, to the satisfaction of the

(*x*) *Ashcroft v. Foulkes*, 18 C. B. 261; 820.
25 Law, J., C. P. 202.

(*y*) *Macdougall v. Paterson*, 11 C. B. 773.

(*z*) *Legge v. Tucker*, 1 H. & N. 500;
20 Law, J., Exch. 71.

(*a*) *Smith v. Harnor*, 3 C. B., N. S.

(*b*) *Dunston v. Paterson*, 5 C. B., N. S.
270. *Abley v. Dale*, 11 C. B. 893.

(*c*) *Bonsey v. Wordsworth*, 18 C. B.
325. *Norman v. Marchant*, 7 Exch. 723.

(*d*) *Corbett v. Gen. St. Nav. Co.*, 4 H.
& N. 482; 28 Law, J., Exch. 214.

court or judge, that the action is one of the excepted actions (ante, p. 812).

What is a residence and carrying on business within s. 128 of the County Courts Act so as to make the action an excepted action.—If at the time of the commencement of the action by the plaintiff he resided more than twenty miles from the defendant (e), the action is an excepted action, and the plaintiff is entitled to his costs, although he may have another residence within the prescribed limits, and may be residing there at the time of the trial (f). And where one of several plaintiffs resides more than twenty miles from the defendant, or one of several defendants resides more than twenty miles from the plaintiff, the action is an excepted action (g). A commercial company established in the metropolis, and carrying on business there, does not also carry on business in a country town within the meaning of sect. 128 of the County Courts Act merely by employing an agent there, and transacting business there in the name of such agent, and not in their own names (h).

The provisions in the statute 19 & 20 Vict. c. 108, s. 18, do not affect the right to costs in cases where the action is an excepted action, so that the party has the election (as regards costs) to proceed either in the superior courts or the county courts (i).

Of the repeal of divers statutes enabling plaintiffs in certain actions to recover double costs.—By the statute 5 & 6 Vict. c. 97, s. 1, it is enacted, that so much of any clause or enactment in any local and personal act, or in any act of a local or personal nature, whereby it is enacted that either double or treble costs, or any other than the usual costs between party and party, may be recovered, shall be repealed, and in lieu thereof the usual costs between party and party may be recovered, and no more. And (s. 2) that so much of any enactment in any publick act, not local or personal, whereby it is enacted that either double or treble costs, or any other than the usual costs between party and party, may be recovered, shall be repealed, and instead of such costs the party shall receive such full and reasonable indemnity as to all costs, charges, and expenses incurred in and about any action or other legal proceeding as shall be taxed by the proper officer in that behalf.

No double costs in error are to be allowed to either party (k).

(e) By straight-line measurement. *Lake v. Butler*, 5 Ell. & Bl. 92.

(f) *Butler v. Ablewhite*, 28 Law, J., C. P. 298; 6 C. B., N. S. 740, overruling *Lake v. Bryant*, 28 Law, J., Q. B. 80.

(g) *Hickie v. Salamo*, 8 Exch. 62.

(h) *Corbett v. Gen. St. Nav. Co.*, 4

H. & N. 482. *Minor v. Lond. & N. W. Rail. Co.*, 1 C. B., N. S. 331.

(i) *Waterlow v. Dobson*, 8 Ell. & Bl. 585.

(k) Reg. Gen. T. T. 16 Vict. c. 25; 1 Ell. & Bl. app. lxxxii. As to double and treble costs, see Gray on Costs, 181–186.

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